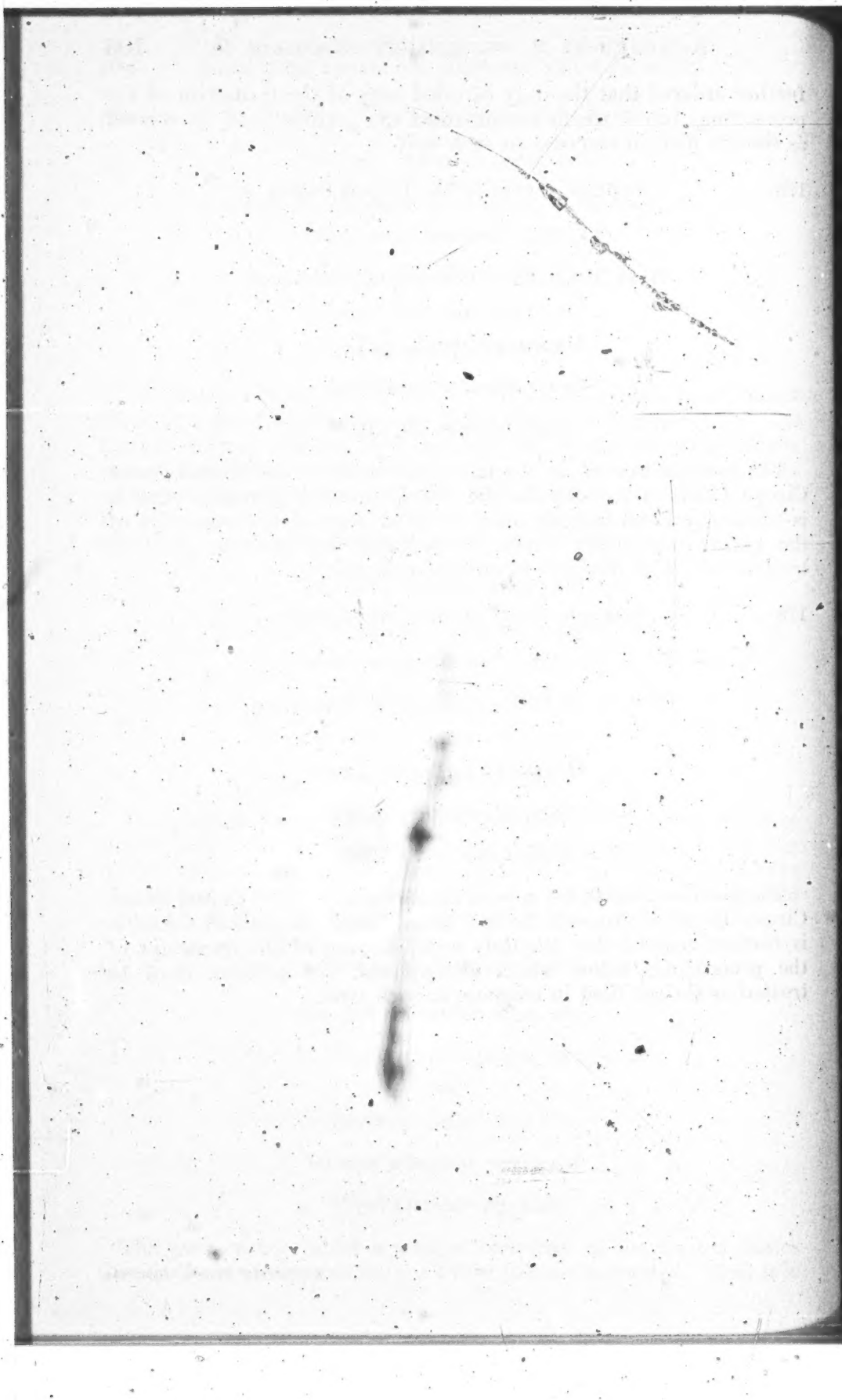

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 435

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. 432

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. 433

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. 434

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1930.
CERTIORARI GRANTED OCTOBER 20, 1930.

(35357, 35354, 35355, 35356)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. —

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

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vs.

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

June term, 1925. No. 11592

KLEIN CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE

Docket Entries

S. V. Hosterman, C. J. Hepburn, Wm. Clarke Mason.
George W. Coles.
Aug. 12, 1925. Præcipe to issue summons filed.
Aug. 12, 1925. Summons exit—returnable 1st Monday in September, 1925.
Aug. 14, 1925. Summons returned on August 13 served and filed.
Aug. 20, 1925. Appearance of George W. Coles for defendant.
May 28, 1926. Statement of claim filed.
May 28, 1926. Notice to file affidavit of defense filed.
Jan. 4, 1927. Affidavit of defense filed.
Mar. 1, 1928. Stipulation to try case before court without a jury filed.
Mar. 20, 1928. Præcipe to place case on argument list filed.
May 21, 1928. Trial before court without a jury.
May 22, 1928. Trial resumed—witnesses sworn.
June 7, 1928. Plaintiffs request for findings of fact and conclusions of law filed.
June 7, 1928. Argued sur P. & P.
June 14, 1928. Testimony filed.
Nov. 22, 1928. Findings of fact and conclusions of law filed.
2 November 22, 1928. Opinion of the court filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
Nov. 22, 1928. On motion of counsel for plaintiff, reargument ordered for December 4, 1928.
Dec. 4, 1928. Reargument sur findings of fact.
January 17, 1929. Opinion sur reargument filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926—No. 12360).
January 22, 1929. Opinion filed November 22, 1928, withdrawn and revised opinion filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term 1926, No. 12360).
Jan. 26, 1929. Plaintiff's exceptions filed.
Jan. 26, 1929. Plaintiff's bill of exceptions and order of court sealing same, filed.
Apr. 22, 1929. Præcipe to enter judgment filed.
Apr. 22, 1929. Judgment in favor of defendant filed.

May 17, 1929. Assignments of error filed.
May 17, 1929. Petition for appeal filed.
May 17, 1929. Order of court granting appeal filed.
May 17, 1929. Præcipe for transcript of record sur appeal filed.
June 10, 1929. Bond sur appeal and order of court approving same filed.
June 10, 1929. Citation allowed and issued.
June 10, 1929. Copy of notice of appeal filed.
June 11, 1929. Citation returned "service accepted" and filed.

3 In United States District Court

[Title omitted.]

Plaintiff's statement of claim

Filed May 28, 1926

The Klein Chocolate Company, the above-named plaintiff, complaining of the above-named defendant, brings this action against Blakely D. McCaughn, internal revenue collector, the defendant above named, upon a cause of action whereof the following is a statement.

1. The plaintiff is a corporation duly organized and existing under the laws of Pennsylvania, having its principal place of business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the district in which the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and
4 sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9) did, for the period aforesaid, assess excise taxes against the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80 and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6) likewise assess excise taxes against the plaintiff aggregating $82,314.12, being 3% of the said sales of $2,743,804, under the guise that sweet chocolate and sweet milk chocolate was "candy."

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of the said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the time hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, excise taxes amounting to $102,066.76 more particularly set forth as follows:

Tax for month of	Date paid	Check No.	On bank	Amount paid
July, 1921	8/30/21	751	Corn Exch. Nat'l, Philadelphia, Pa.	$1,618.62
Aug., "	9/29/21	808	Peoples Trust Co., Lanc., Pa.	3,696.87
Sept., "	10/31/21	618	" " " " "	2,866.16
Oct., "	11/30/21	637	" " " " "	3,899.63
Nov., "	12/31/21	31762	Elizabethtown National	4,094.62
Dec., "	1/31/22	32306	" "	3,872.72
Total				19,732.54
8 Jan., 1922	2/28/22	702	Peoples Trust Co., Lanc., Pa.	2,089.92
Feb., "	3/31/22	777	" " " " "	2,153.40
Mar., "	4/29/22	747	" " " " "	1,916.50
April, "	5/31/22	798	" " " " "	1,447.47
(Special)	6/10/22	797	" " " " "	3,242.43
Made up as follows:				
Additional tax				$2,375.23
5% Penalty				118.76
Interest to June 30, 1920				174.59
Interest 7/1/20-6/1/22				573.85
				3,242.43
May, 1922	6/30/22	809	Peoples Trust Co., Lanc., Pa.	1,883.43
June, "	7/31/22	33896	Elizabethtown National	1,814.39
July, "	8/31/22	831	Peoples Trust Co., Lanc., Pa.	1,495.56
Aug., "	9/30/22	848	" " " " "	2,409.45
Sept., "	10/31/22	874	" " " " "	2,852.91
Oct., "	11/29/22	901	" " " " "	2,790.93
Nov., "	12/30/22	915	" " " " "	2,837.39
Dec., 1922	1/31/23	940	" " " " "	2,041.63
Jan., 1923	2/28/23	980	" " " " "	2,868.44
Feb., "	3/31/23	992	" " " " "	2,929.06
Mar., "	4/30/23	1023	" " " " "	2,192.13
April, "	5/31/23	1056	" " " " "	2,481.19
May, "	6/30/23	1081	" " " " "	2,869.42
June, "	7/31/23	1112	" " " " "	2,052.23
July, "	8/31/23	1144	" " " " "	2,020.61
Aug., "	9/29/23	26	Lancaster Trust Co., " "	2,571.61
Sept., "	10/31/23	1189	Peoples Trust Co., " "	4,123.61
Oct., "	11/30/23	45	Lancaster Trust Co., " "	4,226.23
Nov., "	12/31/23	1226	Peoples Trust Co., " "	2,600.67
Dec., "	1/31/24	1246	" " " " "	1,542.53
Jan., 1924	2/29/24	1268	" " " " "	2,920.55
Feb., "	3/31/24	1285	" " " " "	2,763.64
Mar., "	4/30/24	1298	" " " " "	2,913.41
Apr., "	5/31/24	1317	" " " " "	2,815.95
May, "	6/30/24	1336	" " " " "	2,705.49
June, "	7/31/24	89	Lancaster Trust Co., " "	2,363.21
July 1st and July 2nd	8/29/24	1373	Peoples Trust Co., " "	40.80
Total				82,314.12

SUMMARY

Tax paid at 5% is	$19,732.64
Tax paid at 3% is	82,314.12
Grand total	102,066.76

6. The revenue acts of 1918 and 1921 aforesaid did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate nor upon "tea, coffee, and cacao products."

7. The sweet chocolate and sweet milk chocolate manufactured and sold by plaintiff, as hereinbefore stated, upon the sales of which plaintiff paid a tax to defendant involuntarily and under protest, as hereinbefore stated, are not in fact or law candy, but are the product of cacao (cocoa) beans which are the seeds of the cacao tree, roasted, broken and freed from husks, shells, and germs without the removal of other constituents.

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists of the United States, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular No. 136 of the United States Department of Agriculture which contains the following:

7 (Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products."

"c. Cacao Products."

(1) Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

(2) Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

(3) Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

(4) Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

(5) Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

(6) Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre or starch than is found in the sugar and fat-free residue of chocolate.

8 (7) Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

(8) Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

(9) Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

(10) Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

(11) Milk Chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

10. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C." "Sugars and Related Substances," under which classification is included "Candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. Candy." which is therein defined as "a product made from a saccharine substance or substances."

11. There is no authority vested by Act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

12. The tax paid by plaintiff to defendant as aforesaid, was collected by defendant wrongfully, illegally, and without warrant in law, and to the damage of plaintiff.

13. The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected as per copies of said notices of rejection hereto attached and marked respectively "Exhibit A," and "Exhibit B," which said exhibits are made a part hereof.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

15. Wherefore the plaintiff says that the defendant is indebted to it upon an oral contract, to wit, a contract implied in law, in the

sum of $102,066.76, with interest thereon from the aforesaid several dates of payment, made under protest, and demands judgment against the defendant for that amount with costs.

S. V. HOSTERMAN,
Atty. for Plf.

Office and post office address, Lancaster, Pennsylvania.

10 *Duly sworn to by Wm. Klein. Jurat omitted in printing.*

Exhibit "A" to statement of claim

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Nov. 26, '24.

Address reply to Commissioner of Internal Revenue and refer to MT-ST-CLV, Cls. 332319-324, incl.

KLEIN CHOCOLATE COMPANY,
Elizabethtown, Pa.

GENTLEMEN: Reference is made to claims filed by you for refund of $31,981.65, $34,698.36, $34,895.57, $11,422.78, $35,821.68, and $31,031.45 representing manufacturer's excise taxes alleged to have been erroneously paid for the period February, 1919, to April, 1924, inclusive.

The claims are based upon the contention that the
11 amounts involved were erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products with respect to which the tax involved was paid were properly taxable as candy under section 900 of the revenue acts of 1918 and 1921.

Your claims are, therefore, rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

EMT

Exhibit B to statement of claim

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 3, 1925.

Address reply to Commissioner of Internal Revenue, and refer to MT:ST:JPM. Cl-338560

KLEIN CHOCOLATE COMPANY,
Brown Street, Elizabethtown, Pennsylvania.

GENTLEMEN: Reference is made to your claim filed for the refund of $5,161.53, alleged to have been erroneously paid as manufacturer's excise tax for the period May, 1924, to July, 1924.

Your claim is based upon the contention that the amount involved was erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products, with respect to which the tax involved was paid, were properly taxable as candy under sections 900 of the revenue acts of 1918 and 1921.

Your claim therefore is rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

VFM

12 In United States District Court

[Title omitted.]

Affidavit of defense

Filed January 4, 1927

STATE OF PENNSYLVANIA,
County of Lancaster, ss:

Blakely D. McCaughn, being duly sworn according to law, deposes and says that he is the defendant named in the above-entitled case, and that he has a full, just, true, and legal defense to the whole of the plaintiff's claim of the character and nature as follows, to wit:

1. He admits the allegations of the first paragraph of plaintiff's statement of claim.

2. He admits the allegations of the 2nd paragraph.

3. He has no information as to the allegations contained in the 3rd paragraph of plaintiff's statement of claim nor has he any means of ascertaining whether the facts therein stated are true or not, and he therefore calls for strict proof thereof.

4. He admits the allegations of the 4th paragraph.

5. He admits the allegations of the 5th paragraph.

6. He denies that the revenue acts of 1918 and 1921 did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate.

13 7. He denies that the sweet chocolate and sweet milk chocolate manufactured and sold by the plaintiff upon which taxes were collected and paid, as aforesaid, were not "Candy" within the meaning of the revenue acts of 1918 and 1921.

He avers that the sweet chocolate and sweet milk chocolate manufactured and sold by the plaintiff were "Candy" within the meaning of subdivision 9 of section 900 of the revenue act of 1918; and within the meaning of subdivision 6 of section 900, Title IX of the revenue act of 1921; and that Congress levied an excise tax thereon.

8. He admits the allegation in the 8th paragraph in so far as they refer to authority in the Secretary of Agriculture "to establish standards for food products"; but aver that they are matters wholly immaterial to the issue in this case.

9. He admits the allegations of the 9th paragraph but avers that they are wholly irrelevant and immaterial to the issues in this case.

10. He admits the allegations of the 10th paragraph but avers that they are wholly irrelevant and immaterial to the issues in this case.

11. He admits the allegations of the 11th paragraph but avers that they are wholly immaterial and irrelevant to the issues in this case.

12. He denies that the tax collected, as aforesaid, was wrongfully and illegally collected; but avers that there was warrant in law for the tax collected by the defendant, and that such taxes were sustained by the Circuit Court of Appeals for the First Circuit in the case of Malley, Collector v. Walter Baker and Company, Limited, reported in 281 Federal Reporter, at page 41.

He further avers that the tax collected, as aforesaid, was
14 rightfully and legally collected on the manufacture and sale of sweet chocolate and sweet milk chocolate manufactured by the plaintiff.

13. He admits the allegations of the 13th paragraph.

14. He admits the allegations of the 14th paragraph.

15. He denies that the defendant is indebted to the plaintiff in any amount or that the plaintiff is entitled to recover, under implied contract or otherwise, from the defendant in any amount.

All the facts herein stated of defendant's own knowledge are true; the facts stated upon information from others he believes to be true; and all of them he expects to be able to prove upon the trial of this cause.

B. D. McCaughn,

Subscribed and sworn to before me this 4th day of January, 1926.

[NOTARIAL SEAL.] Anthony T. Mita, *Notary Public.*

My commission expires March 2, 1929.

15 In United States District Court

[Title omitted.]

Stipulation waiving jury

Filed March 1, 1928

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States revised statutes.

George W. Coles,
United States Attorney.
C. J. Hepburn,
Attorney for Klein Chocolate Company.

Philadelphia, Pa., *Feb. 28, 1928.*

16 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BRAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

*Opinions of the court**

KIRKPATRICK, *J.*,

Filed November 22, 1928

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected as typical, for an opinion.

17 The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3 per cent instead of 5 per cent.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as tax-

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* NOTE.—This opinion (filed November 22, 1928), for which the revised opinion of January 22, 1929, was substituted, was changed by the latter in the following particulars only:

(a) The sentence, "This decision had been appealed from and the case was pending in the Circuit Court of Appeals," appearing in the 11th and 12th lines of page 19 was omitted from the revised opinion.

(b) The words, "the pending," appearing in the 2nd and 3rd lines from the bottom of page 19 were omitted from the revised opinion.

(c) The words "concededly not an eo nomine description" appearing in the 17th and 18th lines of page 24 were omitted from the revised opinion.

See pages 31 to 40, both inclusive, for revised opinion.

able under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy
18 departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: Solid chocolate bon bons, "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as "a confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty

years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. This decision had been appealed from and the case was pending in the Circuit Court of Appeals. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a District Court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the members of congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on the pending appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period

of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specifically provided for in this section" and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff acts of March 3, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes
21 referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 163, and other cases.

These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation,

and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved cannot be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity
22 and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed; and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so cerain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted
23 in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53

Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore, not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v.
24 Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term concededly not an eo nomine description, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is

proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the Court: W. H. KIRKPATRICK, *J.*

26 In United States District Court

[Title omitted.]

Findings of Fact

Filed Nov. 22, 1928

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

CONCLUSIONS OF LAW

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the Court:

W. H. KIRKPATRICK, *J.*

27 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Opinion sur re-argument

KIRKPATRICK, *J.*

Filed January 17, 1929

At the request of the plaintiffs the court granted a re-argument in the sixteen cases of which the above entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court in referring to the decision of the District Court

of Massachusetts in Malley v. Walter Baker & Company stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, No. 12360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are: First, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge, and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given

to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all.

The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy" however we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. # 94, October term, 1928) the general rule referred to is reaffirmed. The court said: "Decisions of this court, where the letter

of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve justice, oppression or absurdity, United States, v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the later considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.

By the court.

W. H. KIRKPATRICK, *J.*

31 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Revised opinion of the court

KIRKPATRICK, *J.*

Filed January 22, 1920

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows: "That there shall be levied, assessed, collected and paid upon the

following articles sold or leased by the manufacturer, producer or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

32 The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are "solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the prod-
33 ucts in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under the act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time of the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual Members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to

require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between
35 chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "Unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 8, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 162, and other cases.

36 These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in

the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved cannot be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.

A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be
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Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while

the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore, not open to construction), and yet both have advanced a number of arguments based
38 upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, so nominé, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product.

What was decided was that where there is a word in a statute
39 which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the

latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a great number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the Act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point.

While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

41 In United States District Court

KLEIN CHOCOLATE COMPANY, PLAINTIFF

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR Eastern District of Pennsylvania, defendant

Plaintiff's bill of exceptions

CAPTION

Be it remembered that in the said term of June, 1925, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (prout statement) and the said defendant pleaded (prout plea). And thereupon issue was joined between them.

And thereafter by stipulation filed of record on the 1st day of March, 1928, it was "stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes."

And afterwards, to wit, at a session of the said court, held in the district aforesaid before the Honorable W. H. Kirkpatrick, judge of the said court, on the 21st day of May, 1928, the said issue between the said parties came to be tried by the court without a jury, at which day came as well the said plaintiff as the said defendant by their respective attorneys; and upon the trial, the witnesses being duly sworn or affirmed the following testimony was produced:

42 Transcript of Testimony and Rulings

[Title omitted.]

Before KIRKPATRICK, *J.*

Philadelphia, Pa., Monday, May 21, 1928, at 10.00 o'clock a. m., eastern daylight saving time.

Present: William Clarke Mason, Esq., C. J. Hepburn, Esq., S. V. Hoffman, Esq., and Wm Barclay Lex, Esq., for plaintiff;

R. W. Wilson, Esq., and Mark Thatcher, Esq., for defendant.

Plaintiff's evidence and stipulated facts

Mr. MASON. If your honor please, in cases brought by the Hershey Chocolate Company against B. F. Davis, formerly collector, Nos. 10726 and 10824, and in cases brought by the Hershey Chocolate Company against Ephraim Lederer, formerly collector, Nos. 10822 and 10826, we ask leave to file stipulations amending the name of the defendant by substituting "Executrix" in each case, both of those defendants having died and executrixes having been appointed. In the case of B. F. Davis, we substitute "M. Louisa Davis" as the executrix of the estate of the said B. F. Davis, deceased, and in the case of Ephraim Lederer, we substitute "Grace N. Lederer" as the executrix of the estate of Ephraim Lederer, deceased.

If your honor please, if I may, before starting the proof, I will outline to you, in a very brief way, just what the problem of procedure is that we have here, and ascertain whether it meets with your honor's approval.

48 There are sixteen cases all told, three of them in which the Wilbur-Suchard Chocolate Company is plaintiff, four in which the Klein Chocolate Company is plaintiff, three in which the York Chocolate Company is plaintiff, and six in which the Hershey Chocolate Company is plaintiff, all of them against the Collector of Internal Revenue in office at the time the taxes were paid, and all of them for the payment to the plaintiffs of moneys paid by the manufacturers for excise taxes upon candies under the Act of 1916 and 1921.

Counsel for the Government and counsel for the plaintiffs have found in these cases that, so far as we can see in advance of the proof, substantially all of them involve the same questions. There may be some variations, however, in the proofs in relation to the products of one manufacturer that will not be the same as the proofs in relation to the products of other manufacturers, and on the assumption that that difference may arise, and to protect the record, which is being made in so many cases, tried together, the plan which we propose is this, sir: That the admitted facts in the record of pleadings be put upon the record in each one of the sixteen cases, that the documentary proof, in so far as it is general—and I think it will be general as to all of them—be offered as to all of the cases, that means as to each of them be offered at the one time, that when it comes to oral proof, the witness, when called, shall be called as a witness in the case of one or the other plaintiffs, and that his testimony shall be taken as though given in each of the cases for that particular plaintiff, but as to no others until his testimony is concluded along the particular line in which the examination and cross examination is desired, that at the end of the examination of that particular witness, counsel will then indicate—presumably by agreement—whether, in addition to the testimony being taken for the

cases of one of the four plaintiffs, it shall also be taken for the cases of the other three plaintiffs.

The COURT. At the conclusion?

44 Mr. MASON. At the conclusion of that testimony, and we will then indicate, for the record purposes, how far beyond the original call the testimony shall be extended, in order that not only the court and counsel may have an appreciation of the record facts for the several cases, and the limitation of them, but that the stenographer, in making the record for us, will be guided at that time in the reference to the extent to which that testimony is to be applied, and we expect, sir, that by so doing, we will not only be able to keep these cases and the record of them clearly in line, but that we will be able substantially to save the time of the court and expedite the trial.

The COURT. How many records are you going to make?

Mr. MASON. Our thought——

The COURT. That is surely a way to save time, but what are you going to do about the record?

Mr. MASON. Our thought, sir; we will make our records, and at the end of the hearings before your honor, if all of the testimony is general, we will ask that one record be made up for your honor's consideration and the consideration of counsel.

The COURT. If all the testimony——

Mr. MASON. If all of the testimony applies to all of the cases.

The COURT. For instance, if you call a witness in the three Wilbur cases, and all the testimony applies to all of them——

Mr. MASON. We will make up the one record.

The COURT. Suppose you call a witness in Wilbur, and Klein says that his testimony is applicable to him, and Hershey says no, then you will have to make a separate record?

Mr. MASON. Then, there will be separate records made, but when I speak of making up one record at the end of the testimony, I mean one record preliminarily. Of course, there will be eventually, in all probability, a complete transcript of all of the cases. We will endeavor to so present it that you will not have in the preliminary stage of consideration of these cases more than the one 45 record except where certain testimony is applicable to certain cases only, and in that event, of course, a separate record will be made up for those cases.

Now, sir, pursuant to the agreement made with counsel for the Government and counsel for the plaintiffs, in the opening we desire to offer in evidence those facts set forth in the sixteen statements of claim, which have been admitted by the affidavit of defense or by consent of counsel.

The COURT. Have you copies of those statements?

Mr. MASON. I am going to give your honor a copy of each one, and to state to your honor that on the face of each statement of claim there is marked by lead pencil bracket, on the outside mar-

gin, the admitted facts. In several of the paragraphs there are internal brackets, which relate to words in those paragraphs to be excluded, and we shall ask that the stenographer note, for the purposes of the record, in each case those portions of the statement of claim which are indicated as I have stated, and include them as a part of the record of each case from the pleadings and admissions of counsel as facts admitted in these cases with the same force and effect as if they had been otherwise proved.

For the purpose of the record, may I say this: That in all of the statements of claim where reference is made in language similar to the language in the case of Wilbur-Suchard Company against Grace N. Lederer, No. 10774, to the standards for food products and the definitions of the same, set forth in that statement of claim in paragraphs 7, 8 and 9, the Government—while the pleadings admit the facts as stated in those paragraphs are true—desires to note an objection, and will press and argue the objection to your honor on the admissibility of those facts relating to those standards in these cases, and I call the attention of your honor, for record purposes, that that objection is to be noted wherever those paragraphs appear in the record of each of the cases.

46 The paragraphs referred to are as follows:

7. The act of Congress of June 3, 1902, and supplements, authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

8. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular 136, page 18)

"E. Tea, Coffee, and Cacao Products

"c. Cacao Products

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

47 "6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product.'"

9. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and Related Substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "candy."

48 In addition to the numbered paragraphs in each of the sixteen cases, to which reference is made for the admitted facts, I also offer in evidence the letters attached to the several statements of claim as exhibits in each of the cases to which the letters appear as exhibits, from the Department of Internal Revenue, in which there is set forth the fact that claims for refunds made have been rejected. Those letters are admitted to have been sent by the Department and received by the plaintiffs, and are part of the records of these cases.

So that your honor and all of us on this side of the bar will appreciate just what is involved by these admissions, I call your honor's attention to a typical case, and I am reading from Wilbur-Suchard, No. 10774. The first paragraph sets forth the identity of the plaintiff, and the second the identity of the defendant. The third sets forth the fact that during the period in question the plaintiff sold to its customers sweet chocolate and sweet milk chocolate having a selling price of the amount therein set forth. Those sales will not be made evident by the details of the records. They have been examined and covered by counsel for both parties, and the facts are admitted.

The fourth paragraph sets forth the assessment of the excise tax under the revenue act of either 1918 or 1921.

The fifth sets forth the fact that, under protest, the returns were made and the tax paid.

The seventh, eighth, and ninth paragraphs are the paragraphs setting forth the fact that under the act of Congress of June 3, 1902, and supplements, the Secretary of Agriculture established standards of purity for food products, classified the same and defined those which are set forth in the classification.

The tenth.——

The COURT. He says that he is authorized to establish standards and to classify, but where does he say he defines them?

Mr. MASON. We set forth the fact, sir, that the standards of purity of food products, together with their precedents definitions established by the Secretary of Agriculture, pursuant to statutory authority, are the official standards of such food products of the United States of America.

The COURT. Yes.

Mr. MASON. Then, in paragraph ten, the admitted fact is that there is no authority vested by the act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

The twelfth provides that we have complied with the required regulations and statutory proceedings to claim our refund, and that the refunds were denied, and that the refund of the tax as made, has been refused.

Your honor, therefore, has before you the admitted facts in this case, with the Government's objections to the relevancy of the standards, and if Mr. Thatcher deems it well, we might dispose of that question now, so that we may have your honor's thought about it.

Mr. WILSON. If your honor please, it is admitted, as alleged in the various statements of claim of all these cases, that the Department of Agriculture has been given authority, under the act of Congress, to establish and maintain standards and classifications of food products. We have no quarrel with that proposition at all.

The Government contends that in the instant cases these allegations relating to the authority of the Secretary of Agriculture are immaterial and irrelevant, by virtue of the fact that, under the act of Congress of 1918 and also of 1921, the Commissioner of Internal Revenue was given express authority to promulgate such rules and regulations as would be reasonable, and would amount to a reasonable interpretation and application to all subjects taxed under the revenue acts. The Congress did not attempt, at the time of the passing of those acts, to add any interpretation of any words used.

In section 900, subdivision IX, we find the single word "candy." Under that section 900, an excise tax, manufacturer's excise tax, of 5 per cent will be levied on candy, and, pursuant to that section, the commissioner, by virtue of the authority vested in him by Congress, proceeded to define "candy" and to levy this tax of 5 per cent on products which come within that definition.

The COURT. What is it the Department of Agriculture defines?

Mr. WILSON. The plaintiffs in these cases having alleged in paragraphs 7, 8, and 9—they have dealt somewhat with the history of the congressional act, under and by virtue of which the Secretary

of Agriculture has been given authority to establish standards of purity for food products, and, as I say, we do not dispute that——

The COURT. Yes, sir; but what does it say? I have not read it. In what way does the Department of Agriculture define it?

Mr. WILSON. The Department of Agriculture has issued certain circulars, which are quoted verbatim in these statements of claim, in paragraph 8, wherein it is alleged that the standard of purity for food products was in force May 1, 1919.

The COURT. They put sweet chocolate under the head of——

Mr. WILSON. By the Department of Agriculture sweet chocolate is considered under the head of subdivision "E. Tea, coffee, and cacao products."

The COURT. Yes, all right. It does not happen to be under candy?

Mr. WILSON. No; in the Department of Agriculture it is handled under "Sugars and related substances."

The COURT. Go ahead.

Mr. WILSON. And our contention is that these allegations are wholly immaterial to the issues in this case by virtue of the fact that Congress has, in its revenue acts, specifically designated a certain product, which it says shall be taxed and defines that product, and names it as "candy" and pursuant to that congressional act, the commissioner has set up a definition for taxation purposes, in 51 which the words "milk chocolate" and "sweet chocolate" shall be used and defined as "candy."

It is our contention that whatever authority the Department of Agriculture may have, it is wholly immaterial. We do not deny it, but we do not see where it has any place in these cases. The fact that in the Department of Agriculture "candy" and the other term that was used, "sugars and related substances," are in a separate and distinct classification, may be changed, does not take away from Congress, in 1918, the right to say that a certain product "candy" may be taxed, nor does it take away from the Commissioner of Internal Revenue, under the authority that is vested in him by the Internal Revenue Acts, the right to so treat sweet milk chocolate.

Mr. MASON. With your honor's permission and with the consent of the Government, in view of the argument that has been advanced by Mr. Wilson, I am going to amplify the offer.

The COURT. How are we on the record? Has this offer been objected to on the ground that it is immaterial?

Mr. MASON. As I understand, the Government has objected to the admission of paragraphs 7, 8, and 9 in the case that I read from, and to the other statements in the other cases of a similar nature, on the ground of irrelevancy.

In view of the fact that it was my purpose later to elaborate those averments by offering the full circulars—the standards and the definition—so that the record would be complete, I will offer those now, and I understand the Government makes the same objection.

Mr. WILSON. Yes.

Mr. MASON. The Government makes the same objection to those offers, and I will direct my answer to the Government's objection.

The offer, which is now made, is the offer of the—

Circular No. 10, issued by the Department of Agriculture, on November 20, 1903, entitled "Standards of Purity for Food Products";

52 Circular No. 13, issued by the Department of Agriculture, on December 20, 1904, entitled "Standards of Purity for Food Products";

Circular No. 17, issued by the Department of Agriculture, on March 8, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture, on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 136, issued by the Department of Agriculture, on May 14, 1919, entitled "Standards of Purity for Food Products";

A certified copy of what is entitled "Food Inspection Decision 165 (generally known as "F. I. D."), issued by the Secretary of Agriculture, February 15, 1916; and

A similar food inspection decision, No. 191, issued by the Department of Agriculture, January 19, 1923.

(Papers in question marked "Plaintiff's Exhibits 1 to 7," respectively, both numbers inclusive.)

Mr. MASON. Those include a statement and make reference to the authority on which action was taken by the Secretary of Agriculture, and form the basis for the promulgation of those circulars and decisions.

That authority goes back to the act of June 3, 1902, which is to be found in 32 Statutes at Large, 286, on page 296, in which Congress states: That the authority was given and the appropriation was made, as set forth in that act, to enable the Secretary of Agriculture, in collaboration with the Association of Official Agriculture Chemists and such other experts as he may deem necessary, to establish standards of purity for food products, and to determine what are regarded as adulterations therein for the guidance of the officials of the various States and of the courts of justice.

Pursuant to that authority, the Secretary secured the assistance of various official bodies, those who participated in the compilation of the standards and the definitions being referred to in the 53 official documents issued by the Secretary, and included in them was Dr. Charles A. Crampton, chemist for the Bureau of Internal Revenue, as well as the representatives of the various organizations throughout the country, competent to express opinions concerning the products covered by the regulations, and competent to aid in making a definition for them.

Your honor will find in these official documents that there is given the classification to "chocolate" in the regulations, that were in force at the time the act of 1918 was passed and "candy," which clearly differentiates the two products, and having been so classified, and

having been defined, as you will see in those regulations, we have, by authority of Congress itself, a designation for the one and for the other, which separates them as different things, and those classifications having been made pursuant to the authority given by Congress in 1902, being in force in 1918, being compelled upon all the other Departments concerned with the law applicable to the subject matter of the regulations, they are offered here as evidence to establish the fact that at the time the act of 1918 and the act of 1921 were passed, there was in the mind of Congress, as a result of the action taken pursuant to this authority, a clear distinction between "candy" and "sweet chocolate," and for that reason and for the further reason that not only was Congress thereby guided, but as the acts themselves said, they were for the guidance of the courts of justice—and we are now in a court of justice—we think it is most appropriate that they should be made a part of the record in this case, as an aid to determining what is the meaning that Congress gave to the word "candy" when it adopted that designation as the basis for classification and taxation.

The COURT. The ruling of the court will be reserved on this question. Proceed with the case.

(Copies of the paragraphs in plaintiff's statement of claim, heretofore referred to, follow:

1. The plaintiff is a corporation, duly organized and existing under the laws of Pennsylvania, having its principal place of
54 business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the district in which the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), did for the period aforesaid, assess excise taxes against the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80 and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6), likewise assess excise taxes against the plaintiff aggregating $82,314.12 being 3% of the said sales of $2,743,804 under the guise that sweet chocolate and sweet milk chocolate was "candy."

5 In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of the said sales
55 of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, excise taxes amounting to $102,066.76 more particularly set forth as follows:

Tax for month of—	Date paid	Check No.	On bank	Amount paid
July, 1921	8/30/21	751	Corn Exch. Nat'l, Philadelphia, Pa	$1,618.92
Aug., "	9/29/21	893	Peoples Trust Co., Lanc., Pa	3,690.67
Sept., "	10/31/21	618	" " " " "	2,886.18
Oct., "	11/30/21	637	" " " " "	3,599.65
Nov., "	12/31/21	37762	Elizabethtown National	4,084.43
Dec., "	1/31/22	32506	" "	3,872.72
Total				19,752.64
Jan., 1922	2/28/22	702	Peoples Trust Co., Lanc., Pa	2,099.62
Feb., "	3/31/22	727	" " " " "	2,153.40
Mar., "	4/29/22	747	" " " " "	1,916.50
April, "	5/31/22	788	" " " " "	1,447.47
(Special)	6/10/22	797	" " " " "	3,242.62
Made up as follows:				
Additional tax				$2,377.25
5% penalty				118.76
Interest to June 30, 1930				174.88
Interest 7/1/20-6/1/22				573.85
				3,242.62
May, 1922	6/30/22	906	Peoples Trust Co., Lanc., Pa	1,853.45
June, "	7/31/22	33708	Elizabethtown National	1,814.20
July, "	8/31/22	831	Peoples Trust Co., Lanc., Pa	1,485.78
Aug., "	9/30/22	948	" " " " "	2,403.45
Sept., "	10/31/22	974	" " " " "	3,852.91
Oct., "	11/29/22	901	" " " " "	2,790.66
Nov., "	12/30/22	915	" " " " "	2,827.30
Dec., 1922	1/31/23	940	" " " " "	3,049.63
Jan., 1923	2/28/23	960	" " " " "	2,803.44
Feb., "	3/31/23	992	" " " " "	2,929.08
Mar., "	4/30/23	1042	" " " " "	3,102.13
April, "	5/31/23	1056	" " " " "	2,951.19
May, "	6/30/23	1081	" " " " "	2,889.42
June, "	7/31/23	1112	" " " " "	2,052.23
July, "	8/31/23	1144	" " " " "	2,020.61
Aug., "	9/29/23	26	Lancaster Trust Co., " "	3,571.81
Sept., "	10/31/23	1189	Peoples Trust Co., " "	4,139.64
Oct., "	11/30/23	45	Lancaster Trust Co., " "	4,220.35
Nov., "	12/31/23	1236	Peoples Trust Co., " "	3,003.07
Dec., 1923	1/31/24	1246	" " " " "	1,543.98
Jan., 1924	2/29/24	1268	" " " " "	2,329.58
Feb., "	3/31/24	1285	" " " " "	2,703.84
Mar., "	4/30/24	1296	" " " " "	2,913.42
Apr., "	5/31/24	1317	" " " " "	2,815.95
May, "	6/30/24	1326	" " " " "	2,708.42
June, "	7/31/24	89	Lancaster Trust Co., " "	2,362.21
July 1st and July 2nd	8/30/24	1373	Peoples Trust Co., " "	92.99
Total				82,314.12

SUMMARY

Tax paid at 5% is	$19,752.64
Tax paid at 5% is	82,314.12
Grand total	102,066.76

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular No. 136 of the United States Department of Agriculture which contains the following:

57 (Circular No. 136, page 18)

"E. Tea, Coffee and Cacao Products

"c. Cacao Products

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose) with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

58 "10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

10. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related subtances," under which classification is included "candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. Candy," which is therein defined as "a product made from a sacharine substance or substances."

11. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

13. The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the
59 excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected as per copies of said notices of rejection hereto attached and marked respectively "Exhibit A" and "Exhibit B," which said exhibits are made a part hereof.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

Exhibit A

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Nov. 26, '24.

Address reply to Commissioner of Internal Revenue and refer to MT-ST-CLV. Cls. 332319-324, incl.

KLEIN CHOCOLATE COMPANY,
Elizabethtown, Pa.

GENTLEMEN: Reference is made to claims filed by you for refund of $31,981.65, $34,[illegible].36, $34,[illegible].57, $11,[illegible].78, $35,[illegible].68, and

$1,031.43 representing manufacturer's excise taxes alleged to have been erroneously paid for the period February, 1919, to April, 1924, inclusive.

The claims are based upon the contention that the amounts involved were erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products with respect to which the tax involved was paid were properly taxable as candy under section 900 of the revenue acts of 1918 and 1921.

Your claims are, therefore, rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

EMT

60 *Exhibit B*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 3, 1925.

Address reply to Commissioner of Internal Revenue, and refer to
MT:ST:JPM. Cl. 338560

KLEIN CHOCOLATE COMPANY,
Brown Street, Elizabethtown, Pennsylvania.

GENTLEMEN: Reference is made to your claim filed for the refund of $5,161.53, alleged to have been erroneously paid as manufacturer's excise tax for the period May, 1924, to July, 1924.

Your claim is based upon the contention that the amount involved was erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products, with respect to which the tax involved was paid, were properly taxable as candy under sections 900 of the revenue acts of 1918 and 1921.

Your claim therefore is rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

VFM

61 Mr. MASON. In order that we will have here for record purposes a reference to the statements under consideration, sir, I will call your honor's attention to the revenue act of 1918, Title IX, section 900, subdivision (9), to be found in 40 Statutes at Large, 1157, page 1122; that section, as it stands, reading "Candy, 5 per cent."

The provision of the revenue act of 1918, under this title, imposing the taxes that were provided for in the various following sections and subsections, reads—as I shall give it to your honor in just a minute—"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which sold or leased," that language being the language with

which Title IX, section 900, starts, subsection (9) of that section providing the percentage for candy as 5 per centum.

In view of the fact that, in addition to the act of 1918, these cases involve the provisions of the act of 1921, we call your honor's attention to certain legislative history of the act of 1921, and we desire to offer in evidence, so that it may be upon the record, even though your honor may take judicial notice, this is to have it available for record purposes, the proceedings of certain hearings before the Senate Finance Committee, engaged in the work of promulgating the act of 1921. We offer in evidence a certified copy of so much of the public hearings before the Senate Finance Committee, held May 9 and May 27, 1921, which relates to the proposed tax on candy, as set forth on pages 697 to 708 of the printed reports of those proceedings, the certificate being made by Elmer W. Pratt, clerk of the Committee on Finance.

Mr. WILSON. What is the purpose of your offer?

Mr. MASON. Counsel for the Government asks us for the purpose of that offer.

The COURT. You did state that.

Mr. MASON. I tried to make clear that the purpose of this offer and the subsequent offers will be to try to establish the legislative history of the act of 1921.

62 The COURT. Surely.

(Paper in question marked "Plaintiff's Exhibit 8.")

Mr. MASON. Your honor will recall that the act of 1918 provided for a tax upon candy. When the act of 1921 was under consideration, as shown by this particular report, there were a number of witnesses who presented to the Senate Finance Committee the scope of the previous enactment and complained of the manner in which that statute had not reached competitive products, and among those who raised the question, that there was a failure by then existing legislation to equalize the taxation, by reason of the fact that certain products were taxed and certain products were not taxed, were the representatives of the National Confectioners Association, called upon to speak for the candy manufacturers, and in the course of their presentation of the problem, which the candy manufacturers had under the then existing act, and in support of a request that there should be an equalization of competitive industries, the candy manufacturers called the attention of the Senate Finance Committee to the fact that sweet chocolate was a product in competition with candy, which was not then subject to taxes.

Your honor will find in the argument not only the general language used to show the manner in which chocolate and other products competed with candy, but you will find the statement made, in the first instance, by Mr. Fuller, and, again, my recollection is, by Mr. Price that under the decision of the United States Court in Massachusetts, it had been decided that the act of 1918, levying a 5 per cent tax upon candy, did not levy a tax of similar amount or any amount

upon sweet chocolate, which was a competitor of candy. That matter is brought to the attention of the Senate Finance Committee in this language. Mr. Fuller, speaking on page 699, says this:

"Many articles made from the same ingredients pay an excise tax when manufactured by candy manufacturers, but no specific taxes
63 when manufactured by other, such as cake and cracker manufacturers. Examples of this are stuffed dates, with which you are familiar, fig-filled Newtons, salted peanuts, chocolate bars, etc.

"The United States District Court of Massachusetts has just held that sweet chocolate bars—not the bitter chocolate used by housewives for cooking—are not subject to the 5 per cent excise tax. These bars are universally sold in direct competition with candy paying the 5 per cent excise tax.

"These are the sort of bars to which I refer [indicating samples] and which you see sold constantly in drug stores and news stands.

"Senator WATSON. Was that question tested in the courts?

"Mr. FULLER. In the United States District Court of Massachusetts, Senator Watson.

"Senator DILLINGHAM. In that popular way they are sold as candy?

"Mr. FULLER. Yes, sir; and they are sold in competition with candies universally. These bars are universally sold, as I have stated, in direct competition with candy which pays the 5 per cent excise tax."

Page 701, Mr. Price speaking also, for the Manufacturers Association, and as president of the National Candy Company, calls the committee's attention to the fact in his words:

"It has been recently held by the Massachusetts courts that a chocolate manufacturer may take a piece of chocolate and put a nut in it and it is a food and not subject to tax. We take a nut and coat it with chocolate and it is subject to tax.

"All of these items come in direct competition with candy."

During the hearings upon the revenue act of 1921, the hearings before the House's Ways and Means Committee afford a part of the legislative history of that act, and we offer so much of the hearings of the Committee on Ways and Means—a report of which is cer-
64 tified to by Clayton F. Moore, clerk of the Committee of Ways and Means—as relates to the subject matter of the inquiry before your honor, and reading from page 252 to page 253 of that report, I call your honor's attention to the fact that before the House's Committee of Ways and Means the representatives of the candy manufactures presented the same request to the House as they presented to the Senate for a protection to the candy manufactures from the competition of products sold in competition with candy, and not bearing a tax, and emphasized the fact to the members of the Ways and Means Committee that chocolate—sweet choc-

olate, in the form sold in competition with candy—did not bear the excise tax. The language that I am reading is the language of Mr. Fuller, beginning on page 252:

"It had been my intention, gentlemen, but circumstances manifestly would not permit that, to erect here before you a counter such as you see in the small neighborhood stores, the general country stores, and the 5 and 10 cent stores, because that is where the great bulk of candy is sold, and I would put in that counter these various pieces of candy, in the form in which they are sold, bulk goods, marked as 120 count goods, three for a penny, two for a penny, and so on.

"Congressman FREAR. You are urging that they be taxed the same as on the candy, as I understand?

"Mr. FULLER. I would say, conversely, Mr. Frear, we are urging that we be not taxed when we are forced to sell our articles in competition with those articles; and I would put in that counter tops, toy balloons, squawkers, marbles, glass agates——

"Mr. FREAR (interposing). Baseballs and bats?

"Mr. FULLER. Yes, sir; and these other things that sell for a penny, or a nickel, or a dime. I wish, gentlemen, we could take a child into a store in your presence and give that child a nickel and you could see the child consume half an hour or an hour of the time of the proprietor of that store shopping. Gentlemen, the child is the champion shopper of the country, and he will determine then whether he is getting a penny's worth or a nickel's worth or a dime's worth of candy, or whether he is going to go out and buy something that is not paying any of these taxes, such as the tops or the squawkers, or the marbles, or these other things."

The COURT. He is not interested in quality, but more in the quantity.

Mr. MASON. The most for the money.

The COURT. Yes; cough drops are very popular.

Mr. Mason:

"I have already referred to the fact that many articles which are manufactured by candy manufacturers pay a tax, while the same articles can be manufactured and sold by bakers and cracker manufacturers without paying a tax. Furthermore, the United States District Court of Massachusetts has just held that the sweet chocolate bars, the small sweet chocolate bars with which you are familiar—are not a candy, and that therefore they are not subject to this 5 per cent manufacturers' tax, and yet they are sold in all these stores, and at news stands, and on the trains, etc., in direct competition with candy.

"Mr. FREAR. Would it help matters if we taxed them?

"Mr. FULLER. It would help matters to this extent, Mr. Frear, it would put everybody on the same competitive level; but it would not be fair for us to come here, I think, and suggest that you tax other items, because of the manifest criticism of an industry.

"Mr. FREAR. That is not the question. We have got to raise the taxes from some source and we want to find out what your recommendations are.

"Mr. YOUNG. Your recommendation is to take it off your product.

"Mr. FULLER. Yes, sir.

"Mr. YOUNG. And if not, then you think it ought to be put on competitive products?

"Mr. FULLER. I do not like to say that, Mr. Young. I would much rather the committee would draw its own conclusions."

(Book in question marked "Plaintiff's Exhibit 9.")

66 Mr. MASON. Following that your honor will take judicial notice of the fact, and from these reports you will see that the committees reported the act of 1921 in a form which should not include a tax upon sweet chocolate or sweet milk chocolate. There was, however, a plan in the act that as reported, as your honor will see from the various Congressional Records of that time, a change in the tax on candy, and a change that provided for a similar graduated tax based upon the price of candy, but referring to the products taxed as candy, and not as sweet chocolate, and not in conjunction with sweet chocolate, nor including sweet chocolate in it, the language being identical with the language of the act of 1918, in so far as that commodity is concerned.

The COURT. What kind of a tax is that?

Mr. MASON. They proposed a graduated tax that would ultimately impose a tax of 10 per cent upon candy selling at a maximum price, but the commodity that was to be taxed was still candy with no additions to that word. There was considerable debate in the House and Senate as to whether or not the candy industry could stand more than the smaller tax, and there was a committee amendment proposed that would change the method of taxing, as originally suggested. That debate extended over some substantial period of time.

I desire to offer from those debates, as part of the legislative history of the act of 1921, so much of the debates as are reported in the Congressional Records for the 67th Congress, first session, as of Tuesday, November 1, 1921, being in volume 61, and to be found on pages 7879, in so far as it relates to the subject matter of this hearing; the volume also carries a number; the volume carries 61, No. 144. The page to which I have reference is 7879, without reading the entire debate, sir. Following the general debate upon the quantum the tax on candy should cover, there was a discussion as to whether or not it covered certain commodities also, and on page 7879, in answer to inquiries made by Senator Reed of Missouri, who is always inquisitive, Senator La Follette stated: "Sweet chocolate is not taxed as candy at all. It is not candy and is not so taxed."

67 "Mr. REED. I thank the Senator. I am perfectly content to have the law stand as it is; but if we are going to vote

on the other proposition, I would like to have it voted on in the manner I have suggested."

I might say, sir, that Senator Reed had suggested an amendment to the committee amendment. Further on, in the same debate and reported on the same page, Senator Willis made this inquiry:

"Mr. President, I desire to ask the Senator from New York a question. I do not desire to be misunderstood in my attitude on this. I am in favor of the reduction of this tax, but what I can not understand is why the Senator's committee now proposes to make a larger comparative reduction in the higher grades of candy than is proposed for the lower and cheaper grades of candy. Why should that be done?

"Mr. CALDER. Mr. President, in the committee I voted for the three per cent tax on all candies. I never agreed that ten per cent was wise, and I do not now, and in line with the statement of the Senator from Massachusetts (Mr. Walsh), in my opinion, it would be inequitable and would work a great hardship on the higher and better grades of candy if the ten per cent tax is levied.

"Mr. MCLEAN. I call the attention of the Senator to the prime reason why those of us who are opposed to that amendment thought we ought not to tax the higher grades of candy. For instance, sweet chocolate is not taxed at all, but it comes in competition with chocolate candy, it answers practically the same purpose, so we felt that it was unfair to tax the chocolate candy and let the sweet chocolate monopolize the market.

"Mr. CALDER. That is another excellent argument.

"Mr. MCLEAN. I think that is the prime reason.

"Mr. REED (from Missouri). Mr. President, it seems to me there is a peculiar dearth of argument here or else a plentitude that is so massive that I can not grasp it. The first appeal was for sweet chocolate for the soldiers who had marched in France some
68 three years ago. That necessity does not exist any more. Now it is discovered that sweet chocolates are not taxed at all.

"Next we heard about the poor clerks and stenographers, who had to make their dinners off of it, and now an appeal that would wring tears from the eyes of a marble statue is made for the poor fellow who has had his whiskey taken away from him and is about to have his candy taxed. What a heart-rending thing it is when one contemplates it! Here is an old jag walking down the street, with his tongue dry, longing for the thing that has passed away apparently forever, who goes into a candy store and buys a pound of candy which costs twenty cents, and which is taxed six mills, and that is to close the curtain on the window of his happiness, and he is to see the sunlight of joy no more. That is a funny argument."

In the course of the Senate hearing, sir, and the House, further debates took place, which we do not need to offer, because the next and substantially the important fact, showing the contentions made

for the reduction of the tax on candy from the proposed tax to the tax, which was subsequently made, of three per cent in 1921, instead of five per cent in the act of 1918, and showing how, as part of the history, that one of the controlling reasons that appears to have influenced the Senators in reducing the tax upon candy, was this contention, that other things did not bear the tax at all.

(The court here announced a recess of ten minutes.)

(The court, at 12.10 o'clock p. m. thereupon reconvened.)

Mr. MASON. Now, sir, we would like to follow the legislative history another step by offering in evidence, certified by the clerk of the Committee on Ways and Means, "Notes on the revenue act of 1918, submitted by the Secretary of the Treasury, without recommendation at this time," is the way in which the pamphlet is entitled.

The COURT. What is it, his message to the Ways and Means Committee?

69 Mr. MASON. His submission to the Ways and Means Committee on November 3, 1919, addressed to the chairman of the Committee on Ways and Means, Honorable Joseph W. Fordney, for the purpose of embracing in the history of the act of 1921 so much of the suggestions which, as the Secretary of the Treasury says, are not at that time recommendations as appear on page 34, in relation to section 900, subsection (9), tax on candy, reading as follows:

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

"Strike out subdivision (9) and insert:

"Candy, 5 per centum. Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision, pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, sweetened licorice not taxed as cough drops under section 907, sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, nor glacé or candied fruits purchased for and used in the manufacture of food products, such as ice cream, cakes, and pastries."

(Paper in question marked "Plaintiff's Exhibit 11.")

70 Mr. MASON. Then, we call your honor's attention and suggest the inclusion in the record of the provision of the act of 1921, as passed, Title IX, excise taxes, section 900, reading: "That from and after January 1, 1922, there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold or leased: Subsection VI, candy, 3 per centum."

The COURT. That is the same as the act of 1918?

Mr. MASON. Exactly the same as the act of 1918, without the addition of the suggested definition which Secretary Glass said had been proposed, and without anywhere in the act of 1921 imposing a tax upon sweet chocolate or sweet milk chocolate, or using the general language to include such related subjects in the term of candy or any other taxed substance under the act.

For the purpose of showing the intent of Congress in the use of the word "candy" and as an easy way of bringing previous legislation to your honor's attention, we have prepared here a legislative history beginning with the tariff act of August 10, 1790, showing the use of the words "candy," "chocolate," "sweet chocolate," and "sweet milk chocolate" by Congress; from that time down to the tariff act of September 21, 1922, including not only tariff acts but internal revenue acts, such as the war acts of the 1860's, and one of the later statutes combining the revenue and tariff provisions, and we submit it to your honor in this printed form, and suggest that in that form, for easy reference, it be added to the record. Of course, it is not necessary to offer in evidence acts of Congress, but as it happens to be an easy method of substituting a few pages for many volumes, we suggest that in the printed form, in which it is now presented to the court, that it be added to the record, without being copied by the stenographer. We will furnish sufficient printed copies to take care of the record in each case. I understand that this is not objected to by counsel. It will make it a little bit easier for you.

71 Mr. WILSON. No.

Mr. MASON. In line with the last suggestion, sir, and to make of easy access the content of the standards of purity of food products, which have been offered in evidence in bulk, we have excerpted the relevant parts of the various documents and put them in the same form that we will put the acts of Congress, and we will furnish to your honor, and for record purposes, printed copies of those also. Those show from the various circulars and decisions of the department heretofore offered, the definition and standards of candy and chocolate, sweet chocolate, and sweet milk chocolate in parallel columns, showing the way in which the department has handled it.

Mr. WILSON. Of course, our objection goes as to the materiality of that.

Mr. MASON. It is conceded that any objection that the Government has made to the documents in full would, of course, attach to this excerpted copy from those documents, and which is not intended as additional evidence. It is intended as an easy way of ascertaining what is in the original.

(Two papers in question marked "Plaintiff's Exhibits 12 and 13," respectively.)

Mr. MASON. That is the plaintiff's case in chief, and I may say at this time in view of the fact that it was impossible for counsel for the Government and counsel for the plaintiffs to know just exactly how the case might move as to time, or just how far we would get on to-day, I have agreed with counsel for the Government that the Government witnesses might not be called until to-morrow, and for that reason they may not be here, and if they are not here, with your honor's permission, I will consent to an adjournment of the case until to-morrow morning, so that they may be ready.

Mr. WILSON. If the court please, our witnesses are practically all experts, and if we wanted to call them to-day they would not
72 be ready. Subpœnas have gone out and they will not be here until to-morrow, so, with the permission of the court, we will ask that we adjourn until to-morrow.

The COURT. That is perfectly agreeable to me. Do you think that you will be finished to-morrow?

Mr. WILSON. It will be agreeable for us to start a little earlier.

The COURT. I do not like to burden counsel because frequently you want to take care of your correspondence, but so far as I am concerned nine o'clock is absolutely satisfactory.

Mr. MASON. If it suits my associates, it suits me.

The COURT. If you are all agreed, we will start at nine o'clock.

Mr. MASON. We are quite satisfied here. Your honor asked if the case would be concluded to-morrow. I would be hopeful that it would be. We have a number of witnesses for rebuttal, that we may not be able to put on.

The COURT. I do not believe I will be able to sit on Wednesday. There is just one thing I am expecting, a telephone call that may or may not require me to go back to Easton to-night. If I have to go back to Easton to-night, who shall I notify in that event?

Mr. MASON. If your secretary will notify me, I will notify my associates. I will so arrange that all my associates are notified.

(Adjourned until Tuesday, May 22, 1928, at 9.00 o'clock a. m., daylight saving time.)

Evidence on behalf of defendant

Second day

Philadelphia, Pa., Tuesday, May 22, 1928, at 9.00 o'clock a. m., eastern daylight saving time.

Mr. WILSON. Before opening the defense, your honor, I would like to make a very brief preliminary statement as to the theory on which the defense is proceeding.

73 The COURT. You want this for the record?

Mr. WILSON. Please.

The COURT. All right.

Mr. WILSON. As stated by me yesterday, the Government contends that the Commissioner of Internal Revenue had full power and authority to make his definition of "candy"—that word having been used in the internal revenue acts of 1918 and 1921—providing such definition was reasonable and reasonably applicable to the subject.

At this time I would like to read into the record the definition promulgated by the Commissioner of Internal Revenue, and under which the taxes herein involved were collected. This definition was promulgated originally on May 1, 1919, by the Secretary of the Treasury, and is referred to as Article 22 of the regulations. It originally read as follows:

Mr. MASON. Before you read it, may I ask, for the purpose of the record, whether Mr. Wilson intends to give the basis for that regulation at this time, in view of the fact that in another case the Government did give the basis for it, as the definition suggested by the National Confectioners Association, on behalf of the candy manufacturers, and that was its origin and that was the source from which the Commissioner of Internal Revenue obtained the basis for his definition?

I was wondering if that is to be offered in the record as part of the defendant's case, whether at the same time it ought not to have the history of it and the source of it, but that is for Mr. Wilson.

Mr. WILSON. Of course, the position of the Government in all of these cases is that the origin and the basis of this definition are wholly immaterial in these cases. We are proceeding on the theory that it is a legal, reasonable and just regulation, promulgated under the authority duly vested in the Commissioner of Internal Revenue, and that the definition, as originally worded, and as amended, is all we are interested in at this time.

The definition reads as follows, or read as follows:

74 "Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits, and nuts, glace or candied fruits and nuts, pop corn and other cereals and cereal products mixed or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops, and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, and all similar articles however designated. It does not, however, include cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.

If a manufacturer of glace or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon, or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portions of the goods sold as have been manufactured by him."

On May 10, 1919——

The COURT. What was the date of the definition?

Mr. WILSON. The original definition was May 1, 1919. That is promulgated as article No.—I believe that will be article 22 under the regulation 45.

Mr. MASON. Forty-seven.

Mr. WILSON. On May 10, 1919, there was a ruling made by the commissioner, which I shall read. It is very brief.

75 "Sweet chocolate sold in parcels of such a size and shape that it is commonly purchased and consumed as candy by the general public, is taxable as candy, but sweet chocolate sold in large packages, not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."

Now article 22 was revised in December, 1920, to the extent that while still covering permanently sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, by the introduction of another paragraph excluded—

"Sweet chocolate, glace or candied fruits or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold."

So that the addition to or the amendment of the original definition did not affect sweet chocolate and sweet milk chocolate, except as to the forms sold where further manufacture was necessary or done.

Mr. MASON. Mr. Wilson, may I ask whether you are offering the ruling of the commissioner, as of May 10, 1919, as a regulation authorized by the statute?

Mr. WILSON. In answer to the inquiry of counsel, with regard to the ruling of May 10, 1919, which I quoted——

The COURT. What was the inquiry?

Mr. MASON. I inquired as to whether or not Mr. Wilson was offering the ruling of the Commissioner of Internal Revenue of May 10, 1919, as an authorized ruling of the Treasury Department, or as

a mere interpretative opinion of the commissioner. If it is offered as 1st, then I want to object because it is not an authorized ruling of the Secretary, and if the second, I will object to it because it has not the weight of the commissioner's opinion.

Mr. WILSON. It will be offered under the second designation of counsel. In other words, what we offer is an office ruling.

76 Mr. MASON. My reason for making that distinction at this time is because the act of 1918, section 1009, and the act of 1921, section 1308 gave, in these words, the only power that the department had to make regulations "That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act." There is no provision in either act permitting the Commissioner of Internal Revenue or the Secretary of the Treasury to make a definition of an article taxed by Congress.

The COURT. What was the original regulation?

Mr. MASON. The original regulation was section 22 of article 47, under the act of 1918, which was issued by the commissioner with the approval of the Secretary. That was authorized by the Secretary, but there is no foundation in the act for a ruling by the commissioner in the nature of a definition of the word "candy."

Mr. WILSON. Reference was made on several occasions yesterday by counsel, while reading from papers and documents introduced in evidence by him, to a certain case in Massachusetts, in which a decision for the plaintiff company had been entered shortly prior to the discussions which were taking place in the House and the Senate relative to this particular measure. The following remarks will be off the record.

[Remarks off the record.]

If your honor please, the proof to be offered by these witnesses will be in a limited field. Under the theory in which the defense is proceeding in these cases, we expect to offer proof showing how the products of these companies are purchased from factories, how they are handled through the wholesale confectioners, and from them to the retail confectioners, and from them sold to the consumer. That is all the proof that we are going to have. We are contending that these products are candies, and we are going to offer proof to the effect that they are handled in conjunction with other candies, handled as candies and considered as such by the trade and by the consumer.

77 The COURT. They are sold in candy stores and by candy sellers.

Mr. WILSON. Surely.

Mr. MASON. Of course, the proof as to the physical acts of manufacture, and packing and the identity of the individuals to whom sold could not be objectionable at all. We do object, however, to any proof from witnesses in an effort to establish that sweet chocolate and sweet milk chocolate are sold as candy, or with candy, or to

persons also buying candy, because, to my mind that is totally irrelevant to the issue which is here. The issue, which is here, is whether or not when Congress used the word "candy" that "candy" extended to include a totally different, well known and highly defined article such as sweet chocolate, and that any evidence of the nature outlined by the offer of proof would be merely evidence of persons who would prescribe facts going to show what has been outlined, and, if shown, would be of no aid to the court, and certainly of no effect as a fact on which to found a judgment of sweet milk chocolate as candy.

The COURT. Are you going to offer evidence to show what the composition of this chocolate is?

Mr. WILSON. If the court please, that is a matter entirely within the knowledge of the plaintiff, and the Government has not had the products analyzed. We can say that we know just in a general way, of course, but as to the exact percentages we can not say at this time.

Mr. MASON. Our thought has been and would be, sir, that the varying quality of products would also be immaterial if the Government were to offer it.

The COURT. I merely inquired whether the proof——

Mr. MASON. I am just carrying the thought, until the product is changed and it is no longer just sweet chocolate or sweet milk chocolate. The Government has admitted that articles taxed and on which the tax was paid, for which these suits have been brought to recover what has been paid, are either sweet chocolate or sweet milk chocolate, and going back to the facts, that are already
78 of record here, we have a well-known article, sweet chocolate, a well-known article, sweet milk chocolate, both of which have received a classification, identification, and definition by the authorized arm of the Government through the Secretary of Agriculture and through Congress itself in its legislative history of the tariff and referred to in the acts going all the way through from the year 1790. Therefore, it is our thought, sir, that such evidence as the Government has indicated it desires to offer from these witnesses, would be interesting, but not relevant to the issue that is here.

Mr. WILSON. If the court please, counsel's statement made a moment ago to the effect that the Government admits—to the effect, at least, that the products manufactured by these companies were sweet chocolate or sweet milk chocolate is true to this extent: The allegations of the various statements of claims in these cases allege that the plaintiffs during certain periods of time manufactured and sold certain sweet chocolate and sweet milk chocolate in various forms and sizes. Now, a chocolate cream is a form of sweet milk chocolate, if you want to call it that.

Mr. MASON. Oh, no.

Mr. WILSON. Of course, we have no evidence here. The plaintiffs have taken upon themselves the assumption of the obligation of any

testimony. So far as we know, up to the present moment, these products were sweet chocolate and sweet milk chocolate in different forms and sizes. That is all we know about it. So, when you attempt to talk of sweet chocolate or sweet milk chocolate as referred to by the Department of Agriculture, where the Department of Agriculture was talking about the purity that a certain product had, so far as the quality was concerned to pass the pure food law, you are talking about an entirely different subject than we are. We are interested in a product that is made up of chocolate, sugar, and flavored in some instances with nuts, a finished product, as distinguished from the raw product, which is ground from the cacao bean. If so, we should not admit that the products here involved are sweet chocolate and sweet milk chocolate as referred to by the Department of Agriculture, because they are not.

The COURT. Really, the purpose of your offer is as to the form in which they are sold, and the places in which they are sold, and so on?

Mr. WILSON. Our theory is that these products, as manufactured, since they contain a special percentage of flavor, of nuts and cream, and whatever is put in them, and since they are sold to the candy trade, to the wholesalers, and sold by them to the retailers, and the consumers, they are within the meaning of the act of 1921 where the term "candy" is used.

The COURT. On that theory, leaving out any question of the regulations of either of the departments, if some product contained a sugar, nothing but sugar, made up in the exact form, and was sold to the candy dealers, sold as candy, on that theory that could be developed to show it was candy.

Mr. WILSON. I do not understand your statement. I am sorry.

The COURT. My thought, following that line and leaving out of consideration all of these regulations—suppose there were no regulations at all, and the question was whether sugar came under the head of "candy" at all, just plain candy, and you would offer to prove that ordinary sugar lumps, made up in attractive form, animals, or something of that sort, and sold in candy stores, it would be candy within the meaning of that act.

Mr. WILSON. I would say, in answer to your honor, if ordinary squares of sugar, for instance, Domino sugar were dolled up and fixed up in some attractive package, with labels on them, which would be appropriate to a confection in which sugar was carried, and sold in competition with, but also as candy, I would say they were also within the meaning of the act.

(Recess was here taken until 10.15 o'clock a. m.)

LOUIS NEWHOFF, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. Where do you reside? Where do you live?

A. 1826 South Broad Street.

Q. In Philadelphia?
A. In Philadelphia.
Q. In what business are you engaged?
A. Confectionery.
Q. Confectionery?
A. Yes.
Q. And where is your place of business?
A. 255 Market Street.

Mr. MASON. Mr. Wilson, do I understand that Mr. Newhoff has been called for all four cases?

Mr. WILSON. For the Hershey case.

By Mr. WILSON:

Q. How long have you been engaged in the confectionery business?
A. About thirty-two years.
Q. And what portion of that time have you been here; all the time?
A. In that section, about seven years.
Q. Seven years?
A. That's where I am located now.
Q. I mean in Philadelphia.
A. In Philadelphia all the time.
Q. Do you handle any of the products manufactured by the Hershey Chocolate Company of Hershey, Pennsylvania?
A. Yes, sir.
Q. For how long a time have you handled those products?
A. Since I have—well, it would be about the same time, I believe; something about twenty-five or thirty years, between that time, because when I started in business, Hershey wasn't in the chocolate business then; just about twenty-five or twenty-seven years, something like that.
Q. What of the Hershey products do your carry?
A. We carry practically the complete line.

81 Q. And what, so far as you can recall now, are the names of some of their products?

A. Well, they are making milk chocolate, making chocolate almond bars, and different other items, but they are all chocolate goods.
Q. They are all chocolate goods?
A. They are all chocolate goods.
Q. You have said that you are in the confectionery business?
A. Yes, sir.
Q. What trade do you supply?
A. We supply the candy stores and drug stores.
Q. Candy and drug stores, generally?
A. Yes, and probably the grocery stores. You know, they are handling the goods.
Q. You supply those lines of business with the Hershey products, do you?

A. I do.
Q. Where do you buy the Hershey products?
A. I get them direct from Hershey.
Q. From the factory?
A. From the factory.
Q. How are those products handled by you?
A. Well, as chocolate.
Q. As chocolate?
A. Right.
Q. Your place is advertised as what?
A. As a confectionery.
Q. You handle that stuff as chocolate confectionery, do you?
A. We handle the confectionery line, but there are different varieties in confectionery, but anybody can come in and ask for the particular item. For instance, if they ask for chocolate, I am going to give them chocolate.
Q. Your line, however, is limited to confectionery of all kinds?
A. Of all kinds.
Q. You supply the confectionery trade?
82 A. Exactly.
Q. Do you know, of your own knowledge, whether wholesale confectioners in this community, generally, handle Hershey products? Do you know, of your own knowledge, whether they do?
A. Why, naturally. I believe the majority of jobbers in the confectionery line handle Hershey goods. It is a very prominent item.
Q. You know a great many who do?
A. Sure.
Q. And those products are handled by those men in the confectionery department in the confectionery field?
A. Yes, sir.

Cross examination by Mr. MASON:

Q. Do you handle nuts of any kind? Do you handle salted nuts?
A. We do.
Q. And do you handle salted peanuts?
A. We do.
Q. Salted almonds?
A. Not exactly. The most we do handle are salted peanuts.
Q. And those are handled in the confectionery trade?
A. Some will handle them, and some will not handle them.
Q. You, yourself, do handle them?
A. I do.
Q. Do you handle dates?
A. No; we do not.
Q. Do you handle stuffed dates of any kind?
A. Sometimes, but not all the time. I don't consider it as an item.
Q. Do you handle prunes of any kind?
A. We do sometimes.

Q. Do you handle candied fruit of any kind?

A. What do you mean by "candied fruit"?

Q. What kind of candied fruit do you handle?

83 A. We would say, "candy fills." That would be different kinds of fruit. We do handle them.

Q. Do you handle raisins of any kind?

A. We do.

Q. There is quite a large demand for raisins in the confectionery trade, is there not?

A. Well, it is quite a seller.

Q. And raisins are put up in small boxes, and they are eaten by various people who buy them in the boxes, are they not?

A. Yes, sir.

Q. Do you handle what are called "chocolate covered crackers"—the various confections that are put out by the bakers?

A. Yes, sir; I do.

Q. Those small cakes——

A. Yes; they are put in five-cent packages, chocolate coated; yes, sir.

Q. I am wondering if you also handle those various small toys, balloons, nicknacks of that sort?

A. Well, that is no item; just——

Q. Just a side line?

A. Just on the side.

Q. But you sell them to the confectionery trade, do you not?

A. Oh, yes. I don't know who is buying them, whether it is confectioners or retailers.

Q. The small stores?

A. Yes, sir.

By the Court:

Q. That is, you sell them?

A. We do.

By Mr. Mason:

Q. Mr. Wilson asked you whether the wholesale confectioners handled Hershey's sweet chocolate and sweet milk chocolate.

A. Yes, sir; they do; oh, yes.

84 Q. The tobacco stores also handle Hershey's products, do they not?

A. Yes; they do.

Q. And the wholesale drug jobbers handle Hershey products?

A. Yes; they do.

Q. And the wholesale grocery jobbers handle Hershey products, do they not?

A. Yes, sir.

Q. And what they handle and what you handle are Hershey's sweet chocolate and sweet milk chocolate?

A. Exactly.

Redirect examination by Mr. WILSON:

Q. Your main lines in your store are candies; that is what you mean?

A. Why, the general line.

Q. You are in the candy business, the wholesale business?

A. The wholesale business.

Mr. WILSON. I want to pursue the same line of examination in regard to the Wilbur products.

Mr. MASON. I understand the witness is now being examined in the Wilbur cases. Do you agree, Mr. Wilson, that this testimony will apply to all of the cases?

Mr. WILSON. All right, that will be very agreeable.

Mr. MASON. It is agreed by counsel for the plaintiffs and counsel for the Government that the testimony just given by the witness in relation to the Hershey cases shall apply to the other three plaintiffs, and that it is to be assumed that it would be the same in relation to the sweet chocolate and sweet milk chocolate manufactured and sold by the other three plaintiffs as it has been in relation to the Hershey sweet chocolate and sweet milk chocolate, and that his cross-examination and his answers therein would be the same.

Mr. WILSON. That is all, Mr. Newhoff.

85 ALBERT SCHNEIDER, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. You reside in Philadelphia?

A. I do.

Q. How long have you lived here?

A. All my life.

Q. In what business are you engaged?

A. I am a foreman for the S. S. Kresge Company, 931 Market Street.

Q. Of the Kresge Company?

A. Yes, sir.

Q. How long have you been with that company?

A. I have been with that company eight years.

Q. I will ask you, approximately how many stores are there in the United States operated in this same chain of the Kresge Company?

A. Between 450 and 500, and they are scattered.

Q. Throughout the United States, generally?

A. All throughout the United States.

Q. The same method of classifying goods, and carrying goods, and buying and selling is employed in all those stores, is it not?

A. Yes, sir; it is.

Q. The same system prevails? Now, with regard to the particular store with which you are connected here in Philadelphia, does that store carry any products of the Hershey Chocolate Company of Hershey, Pennsylvania?

A. They carry Hershey's almond bars and milk chocolate bars only.

Q. Just those two products?

A. Yes.

Q. How long have they carried them?

A. As far as I can remember, I have always seen them on our counters.

Q. At any rate, for several years?

A. Yes.

Q. In what department are those goods carried?

86 A. In our candy department.

Q. Do you know, of your own knowledge, that they are carried in the candy department here in this store, with which you are connected?

A. Yes, sir.

Q. How are those goods carried in the other Kresge stores?

Mr. MASON. If you know?

A. The same way. They have got to be.

By Mr. WILSON:

Q. You know that, of your own knowledge, the candy department in the Kresge stores is a separate and distinct department?

A. Yes, sir.

Q. From what place do you buy the Hershey products?

A. We buy them through the Chocolate Sales Corporation of Hershey.

Q. Buy them from Hershey?

A. Yes, sir.

Q. And you sell them to the consumer; that is, the retail trade?

A. The retail trade. We sell right to the customer.

Cross-examination by Mr. MASON:

Q. As I understand it, the Kresge stores have what you call a candy counter or department?

A. Yes, sir.

Q. And what do you sell there?

A. We sell candy, cakes, toy novelties; a hundred different things.

Q. Sweet chocolate?

A. Yes; we sell sweet chocolate; chocolate covered.

Q. And do you sell bitter chocolate?

A. Well, we sell a line from Hershey, which is called the "Cloverdale" chocolate. It is a block chocolate.

By the COURT:

Q. What is the "Cloverdale"? Is that a bitter chocolate?

87 A. No; that's a sweet milk chocolate, the same as the almond bar; only a large cake without nuts.

By Mr. MASON:

Q. The only difference between the sweet chocolate and the almond bar is that the almond bar has a few almonds in it?

A. Yes, sir; that's it.

Q. Will you tell me whether you sell any other sweet chocolate or sweet milk chocolate than Hershey's?

A. Only Hershey's. We carried Klein's until here recently, and we now carry Hershey's exclusively.

Q. In addition to the candy, and the sweet milk chocolate and the cakes that you sell over the candy counter, do you sell chewing gum?

A. Yes, sir.

Q. Do you sell stuffed dates?

A. No; we don't carry those.

Q. Do you sell prunes?

A. No, sir.

Q. Do you sell raisins?

A. In boxes, small boxes.

Q. And those boxes are the small five-cent boxes and the ten-cent boxes, that are put up for consumption by the purchaser?

A. Yes, sir.

Q. And after you open up the box, you find in it the raisins; and you sell, also, salted nuts?

A. Yes, sir; peanuts.

Q. Do you sell only salted peanuts, or a mixture of peanuts, or things of that sort, salted nuts?

A. We sell peanuts, two or three different kinds, and almonds, and things like that; loose salted.

Q. Where do you sell your fruits? In what part of the store do you sell your fruits? Do you sell those at the candy counter?

A. We don't sell fruits. Fruits come under a separate department if we carry such; see?

Q. Do you sell any kind of candied fruits at the candy department?

88 A. Well, if you want to call the orange slices candied fruit, you could call it.

Q. What would you call it? It is a candy?

A. It is the slices only; just with the orange flavor.

Q. Not the solid orange?

A. No.

Q. At the candy counter do you sell at various seasons for various occasions, the holiday trade and St. Patrick's trade, little favors, which are made up to put on a table to decorate a table?

A. No; that is sold—it comes under the stationery department.

Q. What can you say about the other things that you sell at the candy department, besides the things that you have indicated?

A. Well, there's glass novelties filled with candy and such.

Q. Those are sold empty and otherwise?

A. No; mostly all filled. That glass comes with the candy when it is sold.

Q. That is to say, a glass bird or a glass elephant when it is filled with candy becomes candy in the eyes of your department?

A. That's the way it comes to our stores.

Q. It would be rather unfortunate for the person who ate the filling to try and eat the glass containing the candy; would it not?

A. It sure would.

Q. Did you say you also sold toys at the candy department?

A. That's it. We call them "candy toys." Those are bought through our main office in Detroit, our buyer. We have no jurisdiction over it. We have to take what he sends us.

Q. In addition to the candy toys, do you have the paper maché toys as well?

A. No, sir.

Q. Only the glass toys?

A. Yes.

The COURT. Did he sell Klein's some time ago?

89 Mr. MASON. Yes; as I understand it, he sold it until some time ago.

Mr. WILSON. I think this testimony should apply to the Hersney and the Klein cases.

Mr. MASON. That is agreed to.

ISRAEL MARGOLIS, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. You are a resident of Philadelphia?

A. Yes, sir.

Q. Are you in business here?

A. In business in Philadelphia; yes, sir.

Q. And what is the name of your business?

A. We are operating under the name of "Candy Headquarters."

Q. Where is your store?

A. 117 Market Street.

Q. Are you in the wholesale business or retail business, or both?

A. Both.

Q. How long have you been engaged in that business here in Philadelphia?

A. Well, about thirteen or fourteen years.

Q. In Philadelphia?

A. In Philadelphia, in that business.

Q. Does your company carry any of the chocolate products manufactured by the Hershey Company at Hershey, Pennsylvania?

A. Yes, sir.

Q. Can you tell us the names of some of those products?

A. Hershey milk chocolates, Hershey almond bars, Hershey milk chocolate kisses.

Q. Do you carry the bars in different sizes?

A. Five and ten cent, and half pound cakes.

Q. And how long have you carried those products?

A. Ever since I have been selling candy; that's twelve or thirteen years.

Q. And do you sell anything other than candy?

90 A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. What other things do you sell other than candy?

A. We sell tobacco, ice cream supplies, fountain supplies, and sell novelties.

Q. From whom do you buy your Hershey products?

A. From the Chocolate Sales Corporation of Hershey, Pa.

Q. You buy direct from the manufacturer?

A. Direct from the manufacturer; yes, sir.

Q. How are those products handled by you; as what?

A. As chocolate; sold as chocolate.

Q. Your tobacco and your subitems that you mentioned a moment ago, do you handle those wholesale, or retail, or both?

A. Wholesale only.

Q. And you handle candy?

A. Yes, sir.

Q. And included in that is chocolate candy?

A. Yes, sir.

Q. Who do you supply?

A. Well, jobbers, cigar stores, drug stores, groceries, stands—outside stands and indoor stands.

Q. Candy stores?

A. Candy stores; yes, sir.

Q. You do not handle any groceries, do you?

A. No, sir.

Q. You say the name of your place is the "Candy Headquarters"?

A. "Candy Headquarters"; yes, sir.

Q. And in addition to candy, you handle tobacco and sell other supplies?

A. Yes, sir.

Cross-examination by Mr. MASON:

Q. As I understand it, your business is jobbing various small articles, is it not?

91 A. Yes, sir.

Q. And you have told us that you handle tobacco goods?

A. Yes, sir.

Q. Does that mean cigarettes and chewing tobacco?

A. Cigars, cigarettes, and smoking tobacco.

Q. Do you handle chocolate and raisins?

A. Yes, sir.

Q. That is, sweet chocolate and sweet milk chocolate?

A. Yes, sir.

Q. And you sell chocolate almond bars?

A. Yes, sir.

Q. The almond bars that you handle are the same as the sweet milk chocolate, except they have a few almonds in them?

A. A few almonds in them.

Q. You handle, I think you said, certain small articles for the drug stores?

A. Not drug supplies.

Q. You handle cough drops, do you not?

A. Cough drops; yes, sir.

Q. You handle certain soda supplies?

A. Yes, sir.

Q. You handle mint of various kinds?

A. Yes, sir.

Q. And you handle candies?

A. Yes, sir.

Q. And you handle chewing gum?

A. Yes, sir.

Q. And you handle stuffed dates, do you?

A. Chocolate coated dates.

Q. And you handle salted nuts of all kinds?

A. Salted nuts; yes, sir.

Q. What kind of small toys do you handle?

A. We handle balloons, we handle rubber balls; like clay pipes, and sell trinkets.

Q. All kinds of trinkets of that sort. As a matter of fact, you might say it would cover all the articles that would be available in the five and ten cent trade, would it not; a large part of it?

92 A. Penny, five and ten cent trade; yes, sir.

Q. And in the five and ten cent trade you include the raisins that have been spoken of here; that is, the small boxes of raisins?

A. Yes, sir; we handle them.

Q. I wonder do you handle the small cakes, confections of that sort?

A. We handle peanut butter sandwiches, cheese sandwiches, fig sandwiches, in five cent packages.

Q. Do you handle these small cakes that are covered with chocolate?

A. Yes, sir; we handle those.

Q. All things of that kind?

A. Yes, sir.

By the Court:

Q. Eskimo pie?

A. Eskimo pie; no, sir; that's not chocolate, that's ice cream.

Redirect examination by Mr. Wilson:

Q. In your store, the candies, the greater part are on the shelves, aganist the wall, in boxes of different kinds, or where do you keep them?

A. On the shelves.

Q. The Hershey stuff and all the other candies belong on the same shelf, together?

A. Together.

Recross-examination by Mr. MASON:

Q. Wait just a minute, because Mr. Wilson is testifying. As I understand it, you have your various goods divided up into departments, so that you will know what you have got in stock, have you not? You do not have them——

A. Pardon me, do you want me to explain?

Q. Yes.

93 A. I wouldn't place a box of cigars with a box of chocolate in the one bin.

Q. Certainly not.

A. But it is only one store.

Q. But what you do is to separate, in a general way, the various articles that you have there, so that you will know what you have there?

A. Yes.

Q. And in one place you keep your sweet chocolate and your sweet milk chocolate, and in another place you keep your raisins, and in another place you keep your tobacco, and in another place you keep your hard candies, and your various kinds of candies?

A. Sure.

Q. That is all separated in a proper way?

A. So we will know where to lay our hands on it.

Q. Do you handle Klein's?

A. Klein's chocolate; yes, sir.

Q. Do you handle the York chocolate?

A. No, sir; we don't handle it one time.

Q. You did handle it at one time?

A. As far as I can remember, I don't think we did.

Mr. MASON. Then, it is agreed that the testimony of Mr. Margolis will be taken to apply to the Wilbur cases, and the Klein cases, with the same force and effect as it applies to the Hershey cases.

Mr. WILSON. If the court please, that is all the testimony from the defense at this time.

The defendant rests, your honor.

Mr. MASON. If your honor please, the plaintiffs will also rest, so that the record is now complete for your honor.

(Argument set for Thursday, June 7, 1928, at 10.00 o'clock a. m., daylight saving time.)

And thereafter counsel for the plaintiff and counsel for the defendant respectively made requests of the said court for findings of fact and conclusions of law; which requests for findings of fact and conclusions of law respectively were as follows:

94 *Plaintiff's request for findings of fact and conclusions of law*

[Title omitted.]

FINDINGS OF FACT

The plaintiff, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this

case in the findings of fact, requests the court to find the same as follows:

1. The plaintiff is a corporation, duly organized and existing under the laws of Pennsylvania, having its principal place of business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the district in which the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.

4. The collector of internal revenue, the defendant above
97 named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), did, for the period aforesaid, assess excise taxes against the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80 and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6), likewise assess excise taxes against the plaintiff aggregating $82,314.12 being 3% of the said sales of $2,743,804 under the guise that sweet chocolate and sweet milk chocolate was "candy."

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of the said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, excise taxes amounting to $102,066.76 more particularly set forth as follows:

Tax for month of—	Date paid	Check No.	On bank	Amount paid
July, 1921	8/30/21	751	Corn Exch. Nat'l, Philadelphia, Pa	$1,618.62
Aug. "	9/29/21	893	People Trust Co., Lanc., Pa	3,660.87
Sept. "	10/31/21	618	" " " "	2,386.16
Oct. "	11/30/21	637	" " " "	3,599.65
Nov. "	12/31/21	31752	Elizabethtown National	4,014.62
Dec. "	1/31/22	32906	"	3,972.72
Total				19,752.64
Jan. 1922	2/28/22	702	Peoples Trust Co., Lanc., Pa	2,099.02
Feb., "	3/31/22	727	" " " "	2,153.40
Mar., "	4/29/22	747	" " " "	1,916.50
Apr., "	5/31/22	788	" " " "	1,447.47
(Special)	6/10/22	797	" " " "	3,242.43
Made up as follows:				
Additional tax				$2,275.23
5% penalty				113.76
Interest to June 20, 1920				174.58
Interest 7/1/20–6/1/22				573.86
				3,242.43
96 May, 1922	6/30/22	806	Peoples Trust Co., Lanc., Pa	1,883.45
June, "	7/31/22	32906	Elizabethtown National	1,814.30
July, "	8/31/22	831	Peoples Trust Co., Lanc., Pa	1,485.56
Aug., "	9/30/22	843	" " " "	2,498.48
Sept., "	10/31/22	874	" " " "	2,853.91
Oct., "	11/29/22	901	" " " "	2,700.93
Nov., "	12/30/22	915	" " " "	2,827.30
Dec., "	1/31/23	940	" " " "	2,049.62
Jan., 1923	2/28/23	960	" " " "	2,868.44
Feb., "	3/31/23	992	" " " "	2,939.08
Mar., "	4/30/23	1032	" " " "	3,192.12
Apr., "	5/31/23	1056	" " " "	2,681.19
May, "	6/30/23	1081	" " " "	2,889.43
June, "	7/31/23	1112	" " " "	2,052.22
July, "	8/31/23	1144	" " " "	2,030.61
Aug., "	9/29/23	26	Lancaster Trust Co., "	3,571.81
Sept., "	10/31/23	1189	Peoples Trust Co., "	4,123.61
Oct., "	11/30/23	45	Lancaster Trust Co., "	4,226.23
Nov., "	12/31/23	1235	Peoples Trust Co., "	2,900.67
Dec., "	1/31/24	1246	" " " "	1,842.68
Jan., 1924	2/29/24	1268	" " " "	1,929.59
Feb., "	3/31/24	1285	" " " "	1,783.64
Mar., "	4/30/24	1298	" " " "	2,913.41
Apr., "	5/31/24	1317	" " " "	2,615.65
May, "	6/30/24	1339	" " " "	2,708.42
June, "	7/31/24	50	Lancaster Trust Co., "	2,362.21
July 1st and July 2d	8/29/24	1373	Peoples Trust Co., "	90.80
Total				82,314.12

SUMMARY

Tax paid at 5% is	$19,752.64
Tax paid at 6% is	82,314.12
Grand total	102,066.76

6. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation of authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the
97 courts of justice. The standards of purity of food products together with their precedent definitions established by the

Secretary of Agriculture, pursuant to such authority are the official definitions and standards of such food products for the United States of America.

7. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular No. 136 of the United States Department of Agriculture which contains the following:

(Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products

"C. Cacao Products

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contain not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

98 "5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre, or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber, or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

8. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under
99 which classification is included "candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "C. Candy," which is therein defined as "a produce made from a saccharine substance or substances."

9. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

10. The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected.

11. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

12. Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

13. Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an
100 identity well known to dealers in and consumers of food products, and to the Congress of the United States.

14. Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

15. Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or

flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug.

16. Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

17. Sweet chocolate and sweet milk chocolate are not candy.

CONCLUSIONS OF LAW

The plaintiff requests the court to make the following conclusions of law:

1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

101 3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921.

4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant.

5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest.

S. V. HOSTERMAN,
WM. CLARKE MASON,
C. J. HEPBURN,
Attorneys for Plaintiff.

102 *Defendant's request for findings of fact and conclusions of law*

[Title omitted.]

FINDINGS OF FACT

The defendant, considering the facts hereinafter set forth to be proven, requests the court to find the same as follows:

I

The plaintiff is a corporation duly organized and existing under the laws of Pennsylvania, having its principal place of business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

II

The defendant at all the times hereinafter mentioned was the United States collector of internal revenue for the district in which

the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

III

During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and
103 sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.00.

IV

The defendant above named, acting under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), did, for the period aforesaid, collect excise taxes from the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80, and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6), likewise collect excise taxes from the plaintiff aggregating $82,314.12, being 3% of the said sales of $2,743,804.00.

V

The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claim for refund for payment to it of the amounts of the said taxes so paid. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected.

VI

The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

CONCLUSIONS OF LAW

The defendant requests the court to make the following conclusions of law:
104

I

The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

II

The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

III

The defendant is entitled to judgment.

GEORGE W. COLES,
United States Attorney,
Attorney for Defendant.

105 And thereafter, to wit, on November 22, 1928, the said court filed an opinion embodying findings of fact and conclusions of law which follows (in the form revised by the court as indicated by the opinion of January 17, 1929), viz:

Opinion of the court

Filed Nov. 22, 1928

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania.

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected as typical for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid
106 upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissionar of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read. "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds,"
107 "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy; that is, eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon

the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1909 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument, based upon legislative history, applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under the act. The situation at the time of the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the treasury department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court
108 for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here.

There have been called to the attention of the court thirty-two
109 statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years,

all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, "to sugar candy," "all confectionery not specially provided for in this section" and "Unsweetened chocolate and cocoa prepared and manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 162, and other cases.

These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 356; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 182 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but

must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the
111 presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various Acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F–80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

112 Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore not open to

construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the first Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is
113 ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely described an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy

could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

114 To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

Simultaneously with the filing of the foregoing opinion and findings and conclusions the said court filed special findings and conclusions on the requests for findings of fact and conclusions of law as follows, viz:

115 *Findings of facts*

[Title omitted.]

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June Term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

CONCLUSIONS OF LAW

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

116 Upon motion of counsel for plaintiff the court thereafter ordered a reargument of the questions involved, which was had on December 4, 1928, and thereafter on January 17, 1929, the court filed the following opinion modifying and reaffirming the findings and conclusions heretofore made, viz:

Opinion sur reargument

Filed January 17, 1929

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above-entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected.

On page 4 the court in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

117 The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

II

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the Court filed in the case of Blakely D. McCaughn, Number 12360, June Term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are: First, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge, and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of

118 proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber

the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klien and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect
119 of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages," which the act authorized the court to find, included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation.

Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. #94, October Term, 1928) the general rule referred to is reaffirmed. The court said "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression, or absurdity, United States v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in
120 other acts of Congress. The matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the latter considerations were the more important and controlling ones. The conclusions reached in the opinion filed will not be changed.

By the court:

W. H. KIRKPATRICK, *J.*

And thereupon counsel for the said plaintiff did then and there except as set forth in the notes of the trial before the said court without a jury, and did then and there except to the findings of fact and conclusions of law made by the said court as follows, viz:

Plaintiff's Exceptions

A. EXCEPTIONS TO THE FINDINGS IN THE OPINIONS OF THE COURT

1. The plaintiff excepts to the following finding in the revised opinion of the court:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The plaintiff excepts to the following finding in the revised opinion of the court:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with
121 establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The plaintiff excepts to the following finding in the revised opinion of the court:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The plaintiff excepts to the following finding in the revised opinion of the court.

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The plaintiff excepts to the following finding in the revised opinion of the court:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The plaintiff excepts to the following finding in the revised opinion of the court:

"When we examine the revenue acts of 1918 and 1921, it
122 becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The plaintiff excepts to the following finding in the revised opinion of the court:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The plaintiff excepts to the following finding in the revised opinion of the court:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The plaintiff excepts to the following finding in the revised opinion of the court:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The plaintiff excepts to the following finding in the revised opinion of the court:

"To sum up the whole problem, we have here on the one
123 hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The plaintiff excepts to the following finding in the revised opinion of the court:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit, passing upon the same question under the act of 1918, decided that sweet chocolate was properly taxable as candy."

12. The plaintiff excepts to the following finding in the revised opinion of the court:

"In view of what has been said the decision is reached that the collection of the tax was lawful."

13. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15. Oct. T., 1928, U. S. Supreme Court), to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in
its ordinary sense, its general popular meaning will be the
124 most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

14. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15. Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

B. EXCEPTIONS TO THE DENIAL OF PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

1. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

2. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

3. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding
125 cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished products."

4. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, tale, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

5. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, Chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

6. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

C. EXCEPTIONS TO THE DENIAL OF THE PLAINTIFF'S REQUEST FOR CONCLUSIONS OF LAW

1. The plaintiff excepts to the refusal of the court to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

126 2. The plaintiff excepts to the refusal of the court to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

3. The plaintiff excepts to the refusal of the court to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

which was denied by the court.

4. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

which was denied by the court.

5. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

which was denied by the court.

D. EXCEPTIONS TO THE COURT'S CONCLUSION OF LAW

1. The plaintiff excepts to the court's conclusion of law as follows:

127 "1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

2. The plaintiff excepts to the court's conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

3. The plaintiff excepts to the court's conclusion of law as follows:

"3. The defendant is entitled to judgment."

And inasmuch as the said testimony, opinions, findings, and conclusions, so excepted to, do not fully appear upon the record, the said counsel for the plaintiff did then and there tender this bill of exceptions as aforesaid and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the plaintiff did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 26 day of January, 1929.

W. H. KIRKPATRICK, *J.* [L. S.]

PHILADELPHIA, PA., *January 26th, 1929.*

I hereby approve the above bill of exceptions as to form and agree that the same may be settled by the court, and I hereby accept service of notice of settlement thereof in accordance with the ruling of the court.

GROVER W. COLES,
United States Attorney for Defendant.

128 In United States District Court

[Title omitted.]

Præcipe to enter judgment

Filed April 22, 1929

To the Clerk U. S. D. C. E. D. of Pa.:

Enter judgment in the above-entitled case in favor of the defendant and against the plaintiff in accordance with the revised opinion of the court filed January 22, 1929.

GEORGE W. COLES,
United States Attorney.

129 In United States District Court

KLEIN CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE.

Judgment

Filed April 22, 1929.

Before KIRKPATRICK, *J.*

And Now, April 22nd, 1929, in accordance with the revised opinion of the court filed January 22nd, 1929, and by præcipe filed, judgment in the above entitled case is hereby entered in favor of the defendant and against the plaintiff, Klein Chocolate Company.

BY THE COURT.

Attest:

E. G. JOHNSON, *Deputy clerk.*

130 In United States District Court

[Title omitted.]

Assignments of error

Filed May 17, 1929.

Comes now the above named plaintiff, the appellant herein, by its attorneys of record, and assigns as errors upon which it will rely, the following errors as having intervened in the record, proceedings and judgment of the United States District Court for the Eastern District of Pennsylvania in the above entitled cause, to wit:

1. The learned court below erred in the following finding in the revised opinion:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Sec-

retary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The learned court below erred in the following finding in the revised opinion:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years
131 later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The learned court below erred in the following finding in the revised opinion:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The learned court below erred in the following finding in the revised opinion:

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The learned court below erred in the following finding in the revised opinion:

"It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's product in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The learned court below erred in the following finding in the revised opinion:

"When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise fea-
132 tures of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The learned court below erred in the following finding in the revised opinion:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The learned court below erred in the following finding in the revised opinion:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The learned court below erred in the following finding in the revised opinion:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The learned court below erred in the following finding in the revised opinion:

"To sum up the whole problem, we have here on the one hand a pretty well-defined popular usage of the term candy which 138 includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The learned court below erred in the folowing findings in the revised opinion:

"But in Malloy v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy."

12. The learned court below erred in the following finding in the revised opinion:

"In view of what has been said the decision is reached that the collection of the tax was lawful.

13. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15.—Oct. T., 1928, U. S. Supreme Court), to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature in

tended the word to signify. In fact, I do not think that the case cited touches that rule at all."

134 14. The learned court below erred in the following finding in the opinion filed January 17, 1920, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15—Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

15. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1913, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

16. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

17. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

Sweet chocolate is chocolate mixed with sugar (sucrose), with

135 or without the addition of cocoa butter, spices or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

18. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

19. The learned court below erred in denying the plaintiff's requestd for finding of fact as requested, viz:

"Since the act of May 2, 1792, Stat. L. 250, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

20. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy.

21. The learned court below erred in refusing to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

22. The learned court below erred in refusing to affirm the plaintiff's second request for conclusion of law:

136 "2. The revenue act of 1921, did not levy a tax upon sales of sweet chocolate or milk chocolate, eo nomine."

23. The learned court below erred in refusing to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

24. The learned court below erred in refusing to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

25. The learned court below erred in refusing to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in th statement of claim with interest."

26. The learned court below erred in its conclusion of law as follows:

"1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

27. The learned court below erred in its conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

137 28. The learned court below erred in its conclusion of law as follows:

"3. The defendant is entitled to judgment."

29. The learned court below erred in entering judgment against the plaintiff and in favor of the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court for the Eastern District of Pennsylvania may be reversed and the said cause remanded.

S. V. Hoffman,
Wm. Clarke Mason,
C. J. Hepburn,
Attorneys for Plaintiff.

188 In United States District Court

[Title omitted.]

Petition for Appeal

Filed May 17, 1929.

To the Honorable W. H. KIRKPATRICK, *District Judge:*

The above named plaintiff, Klein Chocolate Company, feeling aggrieved by the judgment rendered and entered in the above entitled cause on the 22nd day of April, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it to perfect its appeal, be made.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

KLEIN CHOCOLATE COMPANY,

By S. V. HOSTERMAN,
WILLIAM CLARKE MASON,
C. J. HEPBURN,
Attorneys for Plaintiff.

189 In United States District Court

KLEIN CHOCOLATE COMPANY, PLAINTIFF

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR Eastern District of Pennsylvania, Defendant

Order Allowing Appeal

Filed May 17, 1929

Before KIRKPATRICK, *J.*

Upon the petition of the plaintiff herein and plaintiff's assignments of error, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment heretofore filed and entered in this cause on the 22d day of April, 1929, be and the same is hereby allowed, and that a certified tran-

script of the record in accordance with the rules of practice of the Courts of the United States be transferred to the said United States Circuit Court of Appeals for the Third Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250, the same to act as a bond for costs on appeal.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

BY THE COURT.

Attest:

GEORGE BRODBECK, *Clerk.*

140 In United States District Court

[Title omitted.]

Præcipe for Transcript of Record

Filed May 17, 1929

To the clerk of the said court:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals for the Third Circuit pursuant to an appeal filed in the above entitled case and to include in such transcript the following:

Docket entries;
Statement of claim;
Affidavit of defense;
Stipulation to try case before court without jury;
Opinion, Kirkpatrick, *J.*, filed November 22, 1928;
Findings of fact and conclusions of law;
Opinion, Kirkpatrick, *J.*, filed January 17, 1929;
Revised opinion, Kirkpatrick, *J.*, filed January 22, 1929;
Bill of exceptions;
Præcipe for judgment;
Judgment;
Petition for appeal; and assignments of error;
Order allowing appeal;
Præcipe for transcript of record;
Physical exhibits;
Clerk's certificate.

S. V. HOSTERMAN,
WM. CLARKE MASON,
C. J. HEPBURN,
Attorneys for Plaintiff.

141 [Clerk's certificate to foregoing transcript omitted in printing.]

142 In United States Circuit Court of Appeals for the Third Circuit

No. 4166. October Term, 1929

KLEIN CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

No. 4163

KLEIN CHOCOLATE CO., APPELLANT

v.

EST. B. F. DAVIS, COLLECTOR, APPELLEE.

No. 4164

KLEIN CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

No. 4165

KLEIN CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

Order assigning judge

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

And now, to wit: This 15th day of November, A. D. 1929, it is ordered that Hon. John Boyd Avis, District Judge for the District of New Jersey, be, and he is hereby, assigned to sit in above case in order to make a full court. (Sgd) JOSEPH BUFFINGTON,
Circuit Judge.

143 [Minute entry of argument and submission Nov. 15, 1929, omitted in printing.]

In United States Circuit Court of Appeals for the Third Circuit

[Filed endorsement omittted.]

HERSHEY CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4157 October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4160 October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4159 October term, 1929

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KLEIN CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4166 October term, 1929
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WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4169 October term, 1929
YORK CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4170 October term, 1929
YORK CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4171 October term, 1929
YORK CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4172 October term, 1929

Appeals from the District Court of the United States for the Eastern District of Pennsylvania

Opinion filed June 6, 1930

Before WOOLLEY and DAVIS, *Circuit Judges*, and AVIS, *District Judge*

AVIS, *District Judge:*

These cases were all tried in the District Court at one time; one opinion was rendered in all of the cases, and although brought into this court by separate appeals, were heard in one argument.

Appellants are all manufacturers of sweet chocolate and sweet milk chocolate, the product of the cacao bean, and made certain payments of amounts alleged to be due the Government as taxes, under the revenue acts of 1918 and 1921 and the regulations of the Internal Revenue Commissioner. All of said payments were made "under protest," and later, at different and sundry times, appellants filed claims for refund with the collectors of internal revenue, in the various districts in which payments had been made, for transmission to the Commissioner of Internal Revenue. All of said claims for refund were rejected by the commissioner, and the suits followed.

The district court, sitting without a jury, heard the testimony, held that the tax was lawfully imposed, and caused judgment to be entered in favor of the defendants, and from these judgments, all of the cases are brought by appeal to this court.

Twenty-nine assignments of error were filed, and relied upon by the appellants, but as a matter of fact they are all merged in one question to be decided, i. e., does the word "candy" in the revenue act of 1918 (Title IX, sec. 900 (9)) and the revenue act of 1921 (Title IX, sec. 900 (6)), include sweet chocolate and/or sweet milk chocolate?

The portion of the act of 1918 under which the tax was assessed and paid, reads as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

* * * * * * *

"(9) Candy, 5 per centum; * * *" (40 Stat. c. 18, pp. 1057, 1122).

The act of 1921 reads exactly the same, with the exception that the percentage of tax is placed at 3 per cent instead of 5.

The decision of this question rests upon—

(1) The definition of the word "candy."

(2) Whether or not sweet chocolate and sweet milk chocolate is candy in accordance with its commonly accepted use.

(3) Did Congress intend to include sweet chocolate and sweet milk chocolate under the term "candy" in the revenue acts?

(4) Was the regulation of the Commissioner of Internal Revenue conclusive, and did he have authority, under the acts, to include sweet chocolate and sweet milk chocolate under the term "candy"?

(5) Do the classifications promulgated by the Secretary of Agriculture, under the pure food laws, in any way affect the question of the legality of the tax imposed?

Under the evidence in this case, it is rather difficult to define the word "candy." There is nothing in the testimony, outside of the technical definitions, and possibly the classifications promulgated by the Secretary of Agriculture, to assist the court in arriving at a conclusion as to the inclusiveness of the word. Webster defines candy as follows:

"A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruit, nuts, etc. Also, any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery."

The evolution of the use of sweetmeats in modern times may have, and probably has, extended the meaning of the word to other articles than those strictly included in the definition given by Webster.

Counsel for appellants argue that the classification by the Secretary of Agriculture, under the pure food laws and under authority given by Congress, indicates that sweet chocolate and sweet milk chocolate are not included within the designation of "candy."

It is true that in this classification, candy and chocolate, both "sweet" and "sweet milk," are under separate heads, and it is apparent that for purposes of the statute under which this classification was made, it was undoubtedly treated under separate headings, but this may not be conclusive in construing the revenue acts under which this suit was brought. Whether or not "candy" in its technical sense, includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions, hereinafter set forth, with relation to the intention of Congress when the revenue acts of 1918 and 1921 were enacted.

The court below said, with relation to the word "candy" as it applies to sweet chocolate and sweet milk chocolate:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion.

While some people might look upon it as candy, we feel that many would call it a food, and in the absence of anything in the record tending to show that this is the popular opinion, we can not sustain the judgment of the court on this theory.

We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.

In all of the tariff and internal revenue acts of Congress from 1792 to 1913, candy generally called "sugar candy," and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the Members of Congress.

The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term "candy," is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate eo nomine, notwithstanding the fact that the regulations of the commissioner, classifying both as "candy," under the 1918 act, and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest, et al., v. Lawrence, 54 U. S. 273, 281, said:

"And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article

as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the customhouse.

"It is but fair to presume, after having been treated by the lawmakers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used instead of the one known to trade and commerce, if that should be different."

In Reiche v. Smythe, 80 U. S. 162, 166, it was held:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that if the same word be used in both, and a special meaning were given to it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

The effect of the distinction recognized by Congress is very aptly referred to in the case of Arthur v. Stephani, 96 U. S. 125, 127, 128, wherein the court, among other things, said:

"Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name.

* * * * * * *

"Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties.

* * * * * * *

"It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and of the character described, was not dutiable as 'confectionery' under the act of 1864."

This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case sub judice.

This is further demonstrated by an examination of the record of deliberations and discussions in the committees; and also upon the

floor of the Senate, when the 1921 act was under consideration, which are corroborative of the facts upon which our conclusions are based.

An examination of the evidence offered in this regard, discloses that a Mr. Fuller, apparently a candy manufacturer, called the attention of the Senate committee to a decision in the United States Court, District of Massachusetts, holding that chocolate was not candy, and not taxable under the 1918 act; and that some provision should be made in the 1921 act to put chocolate upon the same basis as candy, either by removing the tax from candy, or, inferentially, to impose a similar tax on chocolate. Similar representations were made to the House Ways and Means Committee; and the question was discussed quite fully on the floor of the Senate, the understanding, apparently at that time, being that the word "candy," in the revenue act of 1918, did not include sweet chocolate or sweet milk chocolate.

In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the committee a definition of the word "candy," which included sweet chocolate and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases.

The deliberations of the committees and the facts produced before them when considering the bill, appear to be legal evidence and should be given its due weight. Holy Trinity Church v. United States, 143 U. S. 457, 464; Binns v. United States, 194 U. S. 486, 495.

In spite of the knowledge of the Representatives and Senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the revenue acts of 1918 or 1921.

In both the revenue acts of 1918 and 1921, the authority of the commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

"That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

It will be noted in this statute, that it provides for "rules and regulations" which shall be "for the enforcement of the provisions of this act."

The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly, the Commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

In the case of Morrill v. Jones, 106 U. S. 466, 467, Chief Justice Waite said:

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

See, also, United States v. United Verde Copper Co., 196 U. S. 207.

A regulation of an executive department construing a statute is given great weight, and is strongly persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See Burk-Waggoner Oil Assn. v. Hopkins (N. D. Tex.), 296 F. 492, and cases cited.

Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining "candy," afterward promulgated by the commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant-appellee.

We, therefore, hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the commissioner, approved by the Secretary.

It is contended by the appellants that the classifications of the Secretary of Agriculture, promulgated under the pure food laws, conclusively define chocolate as a product which could not be included under the term "candy," which is also classified in these regulations. These classifications were made under laws relating to pure foods, and, while they might have some effect upon the establishment of the general definition of the respective products, we can not see that they are in any way controlling on the main questions at issue in these cases.

The case of Malley v. Walter Baker & Co. (C. C. A. 1), 281 F. 41, is strongly relied upon by the appellee, it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley case there was no decision upon the question of what Congress intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able to follow that court

in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word "candy," or in its conclusion that the Commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress.

The judgments of the District Court are reversed and the cases remanded for new trials or other lawful proceedings in conformity with this opinion.

A true copy, teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In United States Circuit Court of Appeals for the Third Circuit.

No. 4166, October term, 1929

KLEIN CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

Judgment, June 6, 1930

In error to the District Court of the United States for the District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and the case remanded to the said District Court for further proceedings in conformity with the opinion of this court.

Philadelphia, June 6, 1930.

(Sgd.) VICTOR B. WOOLLEY,
Circuit Judge.

Similar orders entered June 6, 1930 in the following cases:

Klein Chocolate Co., Appellant, v. Est. B. F. Davis, Collector, Appellee, No. 4163;

Klein Chocolate Co., Appellant, v. Est. E. Lederer, Collector, Appellee, No. 4164;

Klein Chocolate Co., Appellant, v. Est. E. Lederer, Collector, Appellee, No. 4165.

[Clerk's certificate to foregoing transcript omitted in printing.]

United States Circuit Court Of Appeals For The Third Circuit

October term, 1929

No. 4163

Klein Chocolate Company, Appellant

vs.

M. Louisa Davis, Executrix of B. F. Davis, Formerly Internal Revenue Collector, deceased, Appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4166, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term 1929, No. 4166.

Dated June 17, 1929.

S. V. Hoffman,
S. V. Hoffman,
Wm. Clarke Mason,
Wm. Clarke Mason,
C. J. Hepburn,
Attorneys for Appellant.
Gilbert W. Grimm,
Attorney for Appellee.

Approved: June 20, 1929.

Buffington,
C. J. Per curiam.

Endorsement: No. 4163. Stipulation of counsel received & filed July 5, 1929. William P. Rowland, Clerk.

United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss.:

I, William P. Rowland, clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Klein Chocolate Company, Appel-

lant, v. M. Louis Davis, Executrix of B. F. Davis, formerly Internal Revenue Collector, deceased, Apellee, No. 4163, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty and of the independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

149 United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4164

KLEIN CHOCOLATE COMPANY, APPELLANT,

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY INTERNAL REVENUE COLLECTOR, DECEASED, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Klein Chocolate Company, Appellant vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4166, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Klein Chocolate Company, Appellant vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term, 1929, No. 4166.

Dated June 17, 1929.

S. V. HOSTERMAN,
WM. CLARKE MASON,
GEORGE W. COLES,
C. J. HEPBURN,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved: June 20, 1929.
BUFFINGTON,
C. J. Per curiam.

Endorsement: 4164. Stipulation of counsel received and filed July 5, 1929. William P. Rowland, clerk.

150 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss.

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Klein Chocolate Company, Appellant, vs. Grace N. Lederer, Executrix of Ephraim Lederer, formerly Internal Revenue Collector, deceased, Appellee, No. 4164, October Term 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 5th day of September in the year of our Lord one thousand nine hundred and thirty and of the Independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

151 United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4165

KLEIN CHOCOLATE COMPANY, APPELLANT,

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY INTERNAL REVENUE COLLECTOR, DECEASED, APPELLEE.

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term 1929, No. 4166, and that judgment appropriate to the amount involved in this case, shall be entered in this case to the same effect and for the party plaintiff or defendant, as the judgment which will be entered ultimately in the said case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of

Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term 1929, No. 4166.

Dated June 17, 1929.

S. V. Hoffheimer,
S. V. Hoffheimer,
Wm. Clarke Mason,
Wm. Clarke Mason,
C. J. Hepburn,
C. J. Hepburn,
Attorneys for Appellant.
George W. Coles,
George W. Coles,
Attorney for Appellee.

Approved: June 20, 1929.

Buffington,
C. J. Per curiam.

Endorsement: 4165. Stipulation of counsel received & filed Jul. 5, 1929. William P. Rowland, clerk.

152 United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Klein Chocolate Company, Appellant, vs. Grace N. Lederer, Executrix of Ephraim Lederer, formerly Internal Revenue Collector, deceased, Appellee, No. 4165, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty and of the Independence of the United States the one hundred and fifty-fifth.

[SEAL.] Wm. P. Rowland,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Supreme Court of the United States

No. 435, October term, 1930

B. D. McCAUGHN, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 432, October term, 1930

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 433, October term, 1930

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the

proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 434, October term, 1930

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.